TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1922.

No. [redacted]27

THE WICHITA RAILROAD AND LIGHT COMPANY, APPELLANT,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED FEBRUARY 7, 1923.

(23,079)

(28,079)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 722.

THE WICHITA RAILROAD AND LIGHT COMPANY, APPELLANT,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 5, 1921.

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a Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1920, of said Court before the Honorable Walter H. Sanborn and the Honorable John E. Carland, Circuit Judges, and the Honorable Jacob Trieber, District Judge.

Attest:

[Seal of the United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to-wit: on the seventeenth day of December, A. D. 1919, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the District of Kansas, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein The Public Utilities Commission of the State of Kansas, et al., were Appellants, and The Wichita Railroad and Light Company, was Appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

1 (*Citation and Acknowledgment of Service.*)

The United States of America to The Wichita Railroad and Light Company, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to an appeal allowed and filed in the Clerk's office of the District Court of the United States for the First Division of the Judicial District of Kansas, wherein The Public Utilities Commission of the State of Kansas, defendant, and Kansas Gas and Electric Company, Intervening petitioner are appellants and you are Appellee, to show cause, if any there be, why the Decree rendered against the said Appellants, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable John C. Pollock, Judge of the District Court of the United States for the District of Kansas, this 28 day of November, A. D. 1919.

JOHN C. POLLOCK,
United States District Judge for the District of Kansas.

I hereby acknowledge service of the within Citation this 15th day of December, 1919.

T. F. DORAN,
KOS HARRIS,
HENRY J. GREEN,
Attorneys for the Wichita Railroad & Light Company, a Corporation.

Endorsed: Filed in the District Court on December 15, 1919.

2 *Bill of Complaint.*

In the District Court of the United States for the District of Kansas, First Division.

No. 259-N.

THE WICHITA RAILROAD AND LIGHT COMPANY, a Corporation, Plaintiff,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS, Defendant.

Comes now the above named complainant, The Wichita Railroad and Light Company, and for its cause of action against said defendant, alleges that the plaintiff is a corporation duly organized and existing under the laws of the State of West Virginia and a citizen and resident of said State; that it is duly licensed and authorized to do business in the State of Kansas and is engaged in and carrying on the business of a street railway wholly within the City of Wichita in Sedgwick county, Kansas;

That the defendant, The Public Utilities Commission of the State of Kansas, is a regulatory body, created and existing under and by virtue of the laws of the State of Kansas, with its office at Topeka, Kansas; that at the time the opinion and order of said commission hereinafter [co-plained] of was made and filed, said commission was composed of J. L. Bristow, J. M. Kinkel and C. F. Foley, all citizens and residents of the State of Kansas; that since the rendition and filing of said opinion, J. L. Bristow has resigned and Charles Sessions has been duly appointed, has duly qualified and is now a member of said commission, filling the vacancy created by the resignation of J. L. Bristow, and that said Charles Sessions is a citizen and resident of the State of Kansas; that the duties and powers of The Public Utilities Commission of the State of Kansas and of the members thereof are defined and prescribed by chapter 238 of the Session Laws of the State of Kansas for 1911;

That the amount in controversy in this suit exceeds the sum of Three Thousand (3,000) Dollars, exclusive of interest and costs;

That the plaintiff herein is the consumer of large quantities of electric current, purchased and used within the City of Wichita.

Kansas, for the purpose of lighting, heating and operating its cars and shops, and that it purchases said current from The Kansas Gas and Electric Company under a written contract dated the 2nd day of May, 1910, and continuing until midnight on the 30th day
3 of November, 1930; a true copy of which is hereto attached, marked Exhibit B and made a part hereof;

That prior to the 25th day of March, 1918, The Kansas Gas and Electric Company filed with the defendant, The Public Utilities Commission of the State of Kansas, an application entitled, "In the matter of the application of The Kansas Gas and Electric Company to add a surcharge to certain of its rates for electricity" a copy of which is hereto attached marked "Exhibit C" and made a part hereof; that after the filing of said application by The Kansas Gas & Electric Company, a hearing was had thereon by the said The Public Utilities Commission of the State of Kansas, in which hearing, after receiving due notice, this plaintiff participated; then and there, however, objecting to the claimed [juris-tion] of the defendant, The Public Utilities Commission of the State of Kansas, over the plaintiff herein, and then and there objecting to the power and authority of the defendant, The Public Utilities Commission, to change or modify the written contract hereinbefore mentioned, between The Kansas Gas and Electric Company and this plaintiff, dated the 2nd day of May, 1910, which said contract specifically fixes the rates and charges upon and under which The Kansas Gas and Electric Company was bound to furnish this plaintiff electric current from the date of said contract until midnight November 30, 1930; that notwithstanding the objections of the plaintiff herein to the jurisdiction and power of the said The Public Utilities Commission of the State of Kansas and notwithstanding the evidence introduced at said hearing before said commission, the defendant, The Public Utilities Commission of the State of Kansas, without jurisdiction or warrant of law, thereafter, on the 25th day of March, A. D. 1918, made and entered, upon the application of The Kansas Gas and Electric Company aforesaid, its pretended order, a true and correct copy of which is attached hereto, marked Exhibit "A" and made a part of this bill of complaint;

And this complainant further alleges:

First. That the defendant, The Public Utilities Commission of the State of Kansas, was without jurisdiction or lawful authority to hear or determine any question relative to the plaintiff herein, its business, rules, regulations or rates; in that it conducts its business wholly within the City of Wichita and is not subject, under
4 the law, to control or regulation by the Public Utilities Commission of the State of Kansas.

Second. That the defendant, The Public Utilities Commission of the State of Kansas was and is without power and authority to change and modify a written contract fixing the rates, rules, regulations and conditions upon and under which The Kansas Gas and Electric Company delivers electric current to the plaintiff herein, said contract having been entered into, made and executed prior to the

passage of the law creating The Public Utilities Commission of the State of Kansas and defining and fixing its power and duties, and that the plaintiff is the purchaser and user of electricity in the city of Wichita; that if the returns of The Kansas Gas and Electric Company for the sale of electric current throughout its entire system or within the City of Wichita were inadequate or insufficient or unremunerative, that fact is not due to the contract between the plaintiff herein and The Kansas Gas and Electric Company or the rates and charges fixed therein; that the rates and charges fixed in said contract are reasonable, just and remunerative and are not preferential or discriminatory and place no undue burden on the other customers of The Kansas Gas and Electric Company or upon the public; that upon the contrary, the large amount of current sold by The Kansas Gas and Electric Company to the plaintiff and the hours of use thereof are such that the rates fixed in said written contract are in fact as high as they should be and that the purchase of electric current by the plaintiff herein from The Kansas Gas and Electric Company and the constant and continuous use thereof at the rate fixed in said contract of May 2, 1910, enable The Kansas Gas and Electric Company to sell current to its other customers and to the public at a less rate than it would be compelled to charge were not the plaintiff a purchaser and user of such current, that under the terms and conditions of the purchase and use of current by the plaintiff herein under such written contract, the modification thereof and the regulation and change of the rates fixed therein are not within the police power of the State of Kansas; that the contract above mentioned is within the protection of Section 10 of Article 1 of the Constitution of the United States, which forbids any state to pass any law impairing the obligation of contracts; that the law creating the Public Utilities Commission and defining and prescribing its duties and obligations, if applicable to the contract between the plaintiff and The Kansas Gas and Electric Company dated May 2, 1910, is repugnant to said provision of the Federal Constitution and therefore null and void; that the order issued by said defendant changing said contract is nugatory and void and should be enjoined and set aside as hereinafter prayed.

Third. Plaintiff further alleges that the added charges fixed by the order of the Public Utilities Commission dated March 25, 1918, Exhibit "A" hereof, are preferential and discriminatory in that the rates and charges and added rates and surcharges are discriminatory against the plaintiff herein and against every large consumer of electricity and penalize the large consumer of electricity and particularly the plaintiff herein, which is the heaviest consumer of electricity in the city of Wichita or on the lines of The Kansas Gas and Electric Company, and that such discrimination against the plaintiff and the rates fixed upon a scale increasing as the volume of consumption increases is in violation of every correct principle of rate making, in violation of the laws of the State of Kansas, under which said defendant commission is acting, and is discriminatory under both the State and Federal law, is the taking of the plaintiff's property without due process of law and the violation of Article 5 of the

Amendments to the Constitution of the United States and of Article 14 of the Amendments to the Constitution of the United States and a denial of the equal protection of the law, in violation of the 14th Amendment to the Constitution of the United States; that by reason thereof, the order made by said Public Utilities Commission of the State of Kansas is discriminatory, nugatory and void and should be enjoined and set aside as hereinafter prayed.

Fourth. Plaintiff further alleges that said order of the defendant, The Public Utilities Commission of the State of Kansas, made on the 25th day of March, 1918, and the classification of consumers and the schedule of rates or added surcharges fixed therein are unlawful, unreasonable and discriminatory; that by reason thereof, the charges fixed against this plaintiff are unreasonably high and are confiscatory, and result in the taking of the property of the plaintiff without due process of law and deny to the plaintiff the equal protection of the law, in violation of the provisions of the Federal Constitution herein above referred to, and in violation of the laws of the State of Kansas and of every true principle of rate making: that said order of The Public Utilities Commission of the State of Kansas will become effective on Thursday, the 25th day of April, 1918, unless temporarily stayed and enjoined by this Court, during the pendency of this action, in the manner provided in Section 21 of Chapter 238 of the Session Laws of Kansas, 1911, to the great and irreparable damage of the plaintiff herein and plaintiff avers that it has no adequate remedy at law.

6

Wherefore, Plaintiff prays that said order of The Public Utilities Commission of the State of Kansas, made and filed on the 25th day of March, A. D. 1918, be declared discriminatory, excessive, unreasonable, confiscatory and void, in violation of the laws of the State of Kansas and of the United States, and that the same be temporarily stayed and enjoined during the pendency of this action, and that said defendant, The Public Utilities Commission of the State of Kansas and each of the members thereof, pending the final determination of the issues raised herein, be restrained and temporarily enjoined from enforcing or attempting to enforce or put into effect said order or the added rates and charges fixed thereby;

Therefore, let it please your Honor to grant the plaintiff a writ of injunction directed to J. M. Hinkel, C. F. Foley and Charles Sessions, members of The Public Utilities Commission of the State of Kansas, and to their agents and attorneys, commanding and directing them and each of them to do and perform all things herein ordered and directed by the Court, and plaintiff prays for such other and further relief in the premises as to this Honorable Court may seem equitable and just.

LEONARD S. FERRY,
THOMAS F. DORAN,
M. F. COSGROVE,
Solicitors of Complainant.

FERRY, DORAN & COSGROVE,
HARRIS & HARRIS,
Of Counsel.

STATE OF KANSAS,
Shawnee County, ss:

A. M. Patten, of lawful age, being first duly sworn, upon oath says:

That he is Assistant General Manager of the plaintiff in the above entitled action, The Wichita Railroad and Light Company; that he is familiar with the affairs and business of said plaintiff and is the active manager thereof; that he has read and understands the allegations of the above and foregoing bill of complaint; that he
7 makes this affidavit for and on behalf of said plaintiff, being thereunto duly authorized,—and that the allegations of fact set out in said petition are true.

A. M. PATTEN.

Subscribed and sworn to before me, a notary public in and for the County and State aforesaid, this 24th day of April, 1918.

[SEAL.] LOUIE M. BAGLEY,
Notary Public.

My Commission expires Nov. 26, 1920.

(*Præcipe for Subpœna.*)

To the Clerk of said Court:

Please issue a subpœna in the above entitled case for the defendant, the Public Utilities Commission of the State of Kansas, making the same returnable according to law.

Dated April 24, 1918.

FERRY, DORAN & COSGROVE,
Solicitors for Complainant.

(EXHIBIT A.)

(*Order, March 25, 1918, of the Public Utilities Commission of Kansas Authorizing the Kansas Gas and Electric Company to Add a Surcharge to Certain of Its Rates for Electricity in Kansas, etc.*)

At a regular session of the Public Utilities Commission for the State of Kansas, held in its office at Topeka, Kansas, this 25th day of March, A. D. 1918.

JOSEPH L. BRISTOW,
JOHN M. KINKEL,
C. F. FOLEY,
Commissioners.

Docket No. 2344.

In the Matter of the Application of the KANSAS GAS AND ELECTRIC Company for Permission to Add a Surcharge to certain of Its Rates for Electricity.

Be it remembered that on this 25th day of March, A. D. 1918, the matter of the application of the Kansas Gas and Electric
8 Company for permission to add a surcharge to certain of its rates for electricity, came duly on for order by the Commission upon the pleadings of the respective parties and the evidence introduced thereunder; and the Commission, upon consideration of said pleadings and evidence, and being duly advised in the premises, finds that the Kansas Gas and Electric Company should be authorized and permitted to add to its existing rates for electricity supplied by it to consumers in the State of Kansas, until the further order of the Commission, the following net surcharge:

For the first 100 KWH per month no surcharge.
For the next 14,900 KWH per month 1 mill surcharge per KWH.
For the next 20,000 KWH per month 2 mills surcharge per KWH.
For all excess over 35,000 KWH per month 3 mills surcharge per KWH.

The Commission further finds that, until its further order herein, each substation of the Arkansas Valley Interurban Railway Company should not be considered as a separate unit but that monthly bills should be rendered and collected for the aggregate of all current delivered by the Kansas Gas and Electric Company to the Arkansas Valley Interurban Railway Company considered and treated as one customer, and not for each sub-station separately.

It Is Therefore By The Commission Considered And Ordered: That the Kansas Gas and Electric Company be, and it hereby is, authorized and permitted to add to its existing rates for electricity supplied by it to consumers in the state of Kansas, until the further order of the Commission, the following net surcharge:

For the first 100 KWH per month no surcharge.
For the next 14,900 KWH per month 1 mill surcharge per KWH.
For the next 20,000 KWH per month 2 mills surcharge per KWH.
For all excess over 35,000 KWH per month 3 mills surcharge per KWH.

It is further by the Commission considered and ordered: That, until its further order herein, such substation of the Arkan-
9 sas Valley Interurban Railway Company shall not be considered as a separate unit, but that monthly bills shall be rendered and collected for the aggregate of all curent delivered by the Kansas Gas and Electric Company to the Arkansas Valley In-

terurban Railway Company considered and treated as one customer, and not for each substation separately.

By order of the Commission:

CARL W. MOORE,
Secretary.

O. K.
JOSEPH L. BRISTOW,
JOHN M. KINKEL,
C. F. FOLEY,
Commissioners.

"EXHIBIT B."

Agreement, made and entered into this 2nd day of May, 1910, by and between the Kansas Gas And Electric Company, a corporation, of the State of West Virginia and licensed to do business in the State of Kansas (hereinafter referred to as "Power Company"), of the first part, and Wichita Railroad and Light Company, a corporation of the State of West Virginia and licensed to do business in the State of Kansas (hereinafter referred to as "Railroad Company"), of the second part,

Witnesseth:

That, Whereas, Power Company is desirous of equipping a power plant with facilities for supplying electrical capacity and energy for use by Railroad Company as hereinafter set forth, in the operation of and in connection with the railroad system owned, controlled or operated by Railroad Company in and adjacent to the city of Wichita, Kansas, and Railroad Company desires to procure such electrical capacity and energy as it may require for such use.

Now, Therefore, In Consideration of the premises and of the covenants of said parties hereinafter set forth, said parties do hereby mutually agree as follows:

1. Power Company shall forthwith provide and equip a power plant with all necessary facilities for the supply of electrical capacity and energy to Railroad Company for the purposes herein set forth, and from and after the first day of December, 1910, shall at all times stand ready to furnish, electrical capacity and energy as hereinafter provided to Railroad Company, for the purposes aforesaid; provided, however, that if Power Company shall be delayed in the construction or equipment of said power plant by reason of strikes, the act of God, or any other causes beyond the control of Power Company, then the above mentioned time for the completion and equipment of such plant shall be correspondingly extended for the time actually so delayed.

2. The electrical capacity to be furnished hereunder shall be such as will supply at the point of delivery in direct current the number of kilowatts hereinafter specified at a sustained voltage of approximately 550, allowing reasonable variation within reasonable limits not injurious to the service of equipment of the Railroad Company,

the normal voltage not to be less than 525 nor more than 575. The electrical energy to be furnished hereunder shall be the direct current at the above specified voltage obtainable at the point of delivery by the use of the electrical capacity hereinabove defined through the utilization of same as in this contract provided. Said energy shall be delivered to Railroad Company on the lines of Railroad Company at the point where same are to be connected at the latter's expense at the exterior of the building now used as a power station by Power Company located at or near the intersection of Waco Avenue and First Street in said city, or at a new building hereinafter erected by Power Company on said site or at such new station or substation as may be erected by Power Company, hereby granting to Railroad Company the necessary right of way over Power Company's property and the privilege of constructing and maintaining its lines and connections to the exterior of any such station, or sub-station, with all necessary rights of access for inspection, maintenance and use of said lines and connections: Provided however, that if such new power station or sub-station shall be erected by Power Company distant more than one eighth of a mile from the intersection of Sherman and Second Streets, as at present laid out, then Power Company will erect and maintain the necessary transmission lines to transmit and deliver said electrical energy in excess of said one-eighth of a mile to the electrical lines of Railroad Company at said Second and Sherman streets, and Power Company shall bear all losses in the transmission of electrical energy over said transmission wires in excess of said one-eighth mile. Said Electrical capacity and energy shall be measured in said power station or sub-station by meters installed by and at the expense of Power Company proper allowance being made for such transmission losses as above stated.

3. Railroad Company agrees to take all the electrical energy it uses in the operation and maintenance of railroad system or
11 systems owned, controlled or operated by it from Power Company during the term of this agreement. Until otherwise provided in accordance with the terms hereof, Power Company will be required to furnish, and Railroad Company to pay for, at the switchboard in Power Company's said power station, or sub-station, a minimum electrical capacity equal to one thousand kilowatts at 550 volts.

The initial capacity for which Railroad Company agrees to pay Power Company Fifteen Thousand ($15.000) Dollars per year shall entitle Railroad Company to the amount of electrical capacity and energy which it could ordinarily secure by the installation and practical operation and use of one thousand kilowatt engine-driven direct current generator with the ordinary General Electric Company or Westinghouse Electric and Manufacturing Company commercial rating of one thousand kilowatts at 550 volts, such rating calling, among other things, for running said generator continuously at its normal load of one thousand kilowatts for twenty four consecutive hours with a temperature of rise not to exceed thirty five degrees Centigrade and a fifty per cent overload for two hours next succeeding the aforesaid consecutive twenty four hours previous operation

with a temperature rise not in excess of fifty degrees Centigrade and capable of withstanding without injury momentary overloads of one hundred per cent; the Railroad Company to be entitled to use all of the electrical energy and capacity which could be regularly obtained from the usual practical operation of Railroad Company's system of the above described generator of electric railway purposes which Railroad Company could obtain and in practice use, if Power Company did so install and operated for Railroad Company a one thousand kilowatt direct current railway generator as above described, even though Railroad Company does not require Power Company to install a one thousand kilowatt generator of the character above described for the purpose of meeting Railroad Company's requirements hereunder; it being expressly agreed that as and when Railroad Company requires more capacity or more energy than it could fairly and properly obtain from the practicale operation of a one thousand kilowatt direct current engine-driven generator as above described, it will give to Power Company written notice as herein provided to supply the additional capacity under the terms of this agreement and the parties hereto agree that this clause shall be fairly interpreted and fairly adhered to and in the event of any difference in respect to same such difference shall be referred to arbitration as hereinafter provided.

12 4. From time to time as Railroad Company shall desire more electrical capacity than provided for in or obtainable under Section 3 hereof, Power Company, under nine (9) months written notice given to it by Railroad Company (or earlier if it shall be able so to do the Railroad Company shall so desire), shall provide additional capacity in amounts not less than two hundred and fifty (250) kilowatts, or multiples thereof, on the same rating as before described and thereafter for the remaining term of this contract Power Company shall at all times stand ready to supply and Railroad Company shall pay for such additional electrical capacity as so rated, at the same rate as to price, and upon the same terms and conditions as to use and as to percentage of excess capacity over rated capacity to which the Railroad Company shall be entitled, as is provided in respect to said first one thousand kilowatts.

5. The fixed or capacity payments hereinafter set forth, for rated electrical capacity, are to be made under and in accordance with the terms and during the life of this contract, whether any electrical energy is used by Railroad Company or not; provided, however, that for any cessation or diminuation in the service of electrical capacity occasioned through the fault of the Power Company, it shall allow to Railroad Company a pro rata rebate for said capacity charges; and provided further, that if such interruption or diminished service or supply shall not be through any fault of Railroad Company and shall be due to any cause other than the act of God, strikes, unavoidable calamities or to accidents which cannot be reasonably foreseen or are beyond the control of Power Company, then Power Company shall also be liable in damages to Railroad Company.

6. Whenever Railroad Company desires Power Company to install an extra motor driven 550 volt direct current generator of not less than 750 kilowatt capacity as a reserve, to be used only in case of accident to the other 550 volt direct current generating apparatus, Power Company hereby agrees to make such installation upon reasonable notice in writing with the express understanding (*a*) that one-half of the entire cost of installation and maintenance of said generating unti (which means motor generator set, necessary foundations, switchboards, cables and other appurtenances necessary to properly take the alternating current from the alternating current bus bars to said generating unit, and to properly transmit the direct current energy from said generating unit to the direct current bus bars supplying service to Railroad Company), also including
13 one-half of any taxes and insurance that Power Company may be required to pay on account of such spare unit installation, shall be paid by Railroad Company, (*b*) title to said spare unit installation shall be equally and jointly in both companies but Power Company shall have the right to use the same whenever it is necessary to do so by reason of any accident to its other direct current generating apparatus.

To meet the requirements of unusual occasions such as Fourth of July, circus days, festivals or unusual events demanding extra loads, Railroad Company shall be allowed to take electrical capacity in excess of all the capacity to which Railroad Company, at the time shall be entitled without paying any extra capacity charge therefore, but such electrical energy supplied shall be paid for on the per kilowatt hour basis of seven-tenths of a cent, (.7¢) per kilowatt hours, as hereinafter provided. Power Company however, cannot be required to furnish such excess except to the extent that it has suitable electrical capacity and energy available at the time, but nothing herein contained shall be construed to require Power Company to provide or maintain plant or facilities of any kind for furnishing capacity or energy for the special purposes mentioned in Section 6.

7. Power Company shall stand ready to furnish continuously during twenty four hours each day, and during all such time shall furnish, to Railroad Company, all the electrical capacity and energy which Railroad Company, requires hereunder, except in event of any interruption due to the fault of the Railroad Company or the act of God, strikes, unavoidable calamities or accidents beyond the control of Power Company; in which event, Power Company shall be obliged to furnish Railroad Company and Railroad Company shall receive from Power Company during the continuance of such interruption what would be Railroad Company's pro rata share of the entire output of such power station.

Power Company in any and all such instances shall use all reasonable diligence in effecting prompt restoration of the fully capacity of its plant.

The above provision requiring Power Company to stand ready to furnish the full amount of capacity and energy to Railroad Company at any time during the twenty four hours each day, shall not

be so construed as to require Power Company to unnecessarily keep machinery in operation to furnish said power during the hours in which Railroad Company does not ordinarily require the
14 same nor at any time in excess of the actual requirements of Railroad Company; and in case such power is at any time required for use at unusual hours, or for an abnormal operation of Railroad's Company's system, Power Company is to be given such notice as will be reasonable under the circumstances in order that it may be prepared to furnish said power hereunder as required by Railroad Company.

8. The electrical energy furnished hereunder shall not be used for any other purpose than that of operating and maintaining the railroad system or systems owned, controlled or operated by said Railroad Company in and adjacent to the City of Wichita, Kansas, and also the maintenance and operation of such railroad or street railway lines as Railroad Company may arrange to operate or permit to be operated over any of the present or future tracks of said system and desire to furnish electrical energy to or for, it being expressly understood that Power Company cannot be required to furnish electricity for the operation of any cars, except while the same are being run over tracks owned, operated or controlled by Railroad Company, but such power may be used by Railroad Company for the purpose of lighting and heating Railroad Company's cars, car barns, stations, buildings, or parts thereof, street crossings and the lighting of such parks or other places of amusement which are operated or used in connection with said railway system, and under the control thereof and for any purpose connected therewith but in no event for hire except that Railroad Company may continue present outstanding contract with parks. Said Railroad Company shall not sub-let, resell or deliver said electrical energy to others for any purpose whatever without the written consent of Power Company. In the event of any violation of the terms of this provision Power Company may by serving notice in writing upon Railroad Company cancel and rescind this contract to take effect at option of Power Company at the expiration of twelve (12) months from the date of said notice, but without prejudice to Power Company's recourse to other remedies.

9. Railroad Company agrees to pay to Power Company for electrical capacity and energy furnished and provided for under this contract as follows:

(*a*) Railroad Company shall pay to Power Company the sum of one dollar and twenty-five cents ($1.25) per kilowatt per month upon the normal capacity of one thousand kilowatts as specified in "3" hereof.

15 (*b*) Railroad Company shall pay to Power Company the sum of one dollar and twenty-five cents ($1.25) per kilowatt per month for such additional electrical capacity as it may from time to time require, as provided for in "4" hereof.

(*c*) In addition to the fixed payments provided for in (*a*) and (*b*) hereof for electrical capacity, Railroad Company shall pay to Power Company seven-tenths of one cent per kilowatt hours for all electrical energy delivered to said Railroad Company as measured by the meters provided for in "2" hereof.

(*d*) Statements showing the amount of electrical capacity and energy furnished during the preceding calendar month, shall be rendered by Power Company to Railroad Company on or before the 5th day of each month during the term of this contract, and payment shall be made by Railroad Company within fifteen (15) days after rendition of such statements; and if not so paid the same shall draw interest at the rate of six per cent (6%) per annum.

10. In event Railroad Company shall make default in payment of any bills rendered by Power Company hereunder, and if such default shall continue for the period of thirty (30) days after such payment is due, then Power Company, at its election, shall have the right to discontinue delivery of electrical capacity and energy hereunder to Railroad Company during such time as such default shall continue, and until Railroad Company shall reimburse and pay the Power Company such sum as shall be agreed upon by parties hereto, or be determined (in the event of disagreement) by the Board of Arbitration hereinafter provided for, or until such time as such Board of Arbitration shall find that nothing is due from Railroad Company to Power Company hereunder. Or if Railroad Company shall fail for any period of not less than nine (9) consecutive months, continuously, to make settlement of its indebtedness arising hereunder to Power Company, then Power Company, may at its election, upon written notice ipso facto terminate and rescind this contract, but such option to terminate shall not be in substitution, but shall be cumulative to all other recourse by Power Company to remedies available to it at law or equity.

11. Power Company once each month during the term hereof shall inspect and test the meters used by Power Company in measuring electrical energy supplied to Railroad Company hereunder, such inspection and tests to occur as nearly as practicable on the first days of each and every month and within five (5) days thereafter, Power Company shall furnish Railroad Company with
16 a complete statement of such inspection and tests, certified to be correct by the proper officials of Power Company; and Power Company shall promptly correct any inaccuracies in said meters, and at all times keep the same in accurate and proper operating condition, all at the cost of Power Company.

Power Company agrees that Railroad Company shall at all reasonable times have access to its station for the purpose of reading the meters used to measure the electrical energy delivered to Railroad Company under this contract, and that, at its own expense, Railroad Company may install and maintain watt meters, recording ammeters, and other instruments for the purpose of checking Power

Company's meters as aforesaid and the service furnished Railroad Company hereunder. Power Company agrees that at reasonable intervals Railroad Company may, in the presence of a representative of, but without charge therefor by Power Company, makes a test of Power Company's meters used in measuring electrical energy furnished Railroad Company hereunder. If Railroad Company at any time shall desire to cause an inspection and test of said Power Company meters to be made by an electrical engineer or expert, it shall have the right so to do, and Power Company agrees promptly to arrange therefor; whereupon such test shall be made at time or times mutually agreeable to and in the presence of representatives of the parties hereto. In event as a result of any such test taken under fair and reasonable conditions, it shall appear that all said meters register commercially correct (meaning thereby within a variation of four per cent from absolute or theoretical accuracy), then the reasonable expense of such test shall be assumed and defrayed by Railroad Company, but if such test disclose inaccuracies in said meters, or any thereof, exceeding such variation of four per cent, (4%), then the reasonable expense of such test shall be assumed and defrayed by Power Company, and Power Company shall reimburse or allow Railroad Company such excess as may have been paid by or charged to Railroad Company by reason of such inaccuracy or variation in excess of said four per cent (4%) in said meter or meters since the last preceding monthly test by Power Company; or if such meter or meters shall have registered short, then Railroad Company shall make good to Power Company any deficit in the amount payable to Power Company by Railroad Company by reason of any such inaccuracy or variation in said meter or meters in excess of said four per cent (4%) from the last preceding monthly test by Power Company.

17 In the event of a stoppage of the meters installed by both Power Company and Railroad Company, the amounts of electrical energy furnished to Railroad Company by Power Company measured by such instruments during the month in which stoppage occurs, shall be made up and settled on the basis of the average amounts measured by Power Company's instruments during the two months next preceding, and if energy has not been measured by such instruments during the two months preceding, then, if the operating conditions during the two months next succeeding shall be substantially similar to those existing during the period of stoppage, said amount shall be determined and settled on the basis of the average amount supplied during such succeeding two months but if the operating conditions during such period shall be substantially dissimilar, and Power Company and Railroad Company cannot agree as to the basis of settlement the amount due shall be determined by arbitration as hereinafter provided, and payment made accordingly.

Both Power Company and Railroad Company shall use due diligence in keeping their respective meters in proper adjustment and repair. All the rights and conditions herein contained as to the inspection and testing of Power Company's meters by Railroad Com-

pany, it is agreed shall conversely apply to the inspections and tests by Power Company of Railroad Company's meters.

12. Power Company shall save and keep harmless Railroad Company from any and all liability, loss, damage and expense under or by reason of any claims for injury to person or property occasioned by the electrical energy up to the point of delivery thereof by Power Company as provided herein, except as to such injuries as may result from negligence of Railroad Company or any of its servants, agents or employees; and the Railroad Company shall save and keep harmless Power Company from any and all liability, loss, damage and expense under or by reason of any claim for injury to person or property occasioned by the electrical energy beyond the point of delivery thereof as aforesaid, except as to such injuries or damages as may result from negligence of Power Company, or any of its servants, agents, or employees, including in such exception, but not limited to, injuries or damages occasioned by or connected with excessive voltage exceeding those herein provided for, and Railroad Company shall save and keep harmless Power Company from any loss or liability arising from accidents to agents, servants, or employees of Railroad Company entering upon the property of Power Company, provided such accidents are not occasioned through negligence or carelessness of Power Company.

13. In the event that any controversy shall arise between the parties hereto under or in connection with this contract, the same upon request of either party, shall be referred to the determination of three arbitrators to be appointed in the matter hereinafter provided. At the time of filing such request for arbitration, the party making the same shall designate one disinterested person as its arbitrator; within ten (10) days after such request shall have been communicated to the other party hereto, such other party shall designate a disinterested person to act as its arbitrator, and the arbitrators thus designated, shall within ten (10) days after the appointment of the second, name a third arbitrator, whereupon said arbitrators shall proceed to hear, consider, and determine the subject in dispute, requiring the production of such data or papers as they may desire from each or both of the parties to this agreement. In the event of failure of the arbitrators first designated, within ten (10) days after the naming of the second of such arbitrators, to select such third arbitrator, or in the event of failure of the three arbitrators, within thirty days after the naming of the third arbitrator, to make an award upon the subject matter arbitrated, then and in either case, said arbitrators shall be discharged without compensation and a new board of arbitration chosen in like manner as if none had been previously selected. Each party hereto shall pay the cost of its own arbitrator, and both parties jointly, share and share alike, shall assume and pay the compensation and expenses of the third arbitrator, the same to be agreed upon at the time of reference to arbitration. Each and both parties hereto shall and agree to be bound by the award of said arbitrators.

Said arbitrators shall hear the testimony upon the controversy

submitted, at the City of Wichita, Kansas, unless some other place shall be mutually agreed upon, and each of said parties shall have all the rights given by the Statutes of Kansas to parties to arbitration agreements, for obtaining legal process to compel the attendance of witnesses, and to have the arbitrators and witnesses sworn, and the award of the arbitrators shall be drawn up in writing and signed by the arbitrators, or a majority of them, and if either party shall fail to comply with the award, then such award may be filed in the District Court of Sedgwick County, Kansas and judgment shall be entered thereon, and such judgment shall have the effect of and be enforced in the same manner as judgments entered upon awards of arbitrators under the laws of Kansas.

14. In the event that a breach of this contract is committed by either party and remedy therefor is not herein otherwise provided, such breach shall not be deemed sufficient ground for cancellation hereof unless the offending party persists in or fails to correct said breach within thirty (30) days from the date of receipt of notice thereof in writing from the aggrieved party. If at the end of said thirty (30) day period, said breach has not been corrected then the aggrieved party may at its option give notice in writing of its election to cancel this contract and the same shall be cancelled and terminated at the end of eleven (11) months from the date of receipt of said last mentioned notice but any such cancellation shall not be in substitution but cumulative with all other remedies of the aggrieved party either at law or in equity.

This contract shall become operative upon the date that electrical capacity and energy is first furnished hereunder and unless sooner cancelled under some of the provisions hereof shall expire by limitation at twelve o'clock (12.00) midnight, November 30th, 1930.

15. If at any time during the term of this contract, Power Company directly or indirectly shall contract to or shall furnish, sell or deliver electrical energy or current to any person, persons or corporations for use directly or indirectly or for resale or for conversion or redelivery for or which electrical energy or current shall be directly or indirectly used in electric street railway operation within the present or future corporate limits of said city of Wichita, Kansas, or in interurban or electrical railway operation within said city, without written consent of Railroad Company, the Railroad Company may at its option terminate this contract by giving notice in writing to Power Company, not later than thirty days from the date that such breach of this covenant comes to the knowledge of Railroad Company, of its intention to terminate this contract, and this contract shall thereupon terminate and be at an end in eleven months from the date that such written cancellation notice is served upon Power Company, by the Railroad Company, provided, however, that any waiver by Railroad Company of any such breach shall extend but to the particular breach so waived, and shall not be constructed to restrict or limit the right of Railroad Company to exercise its option of cancellation on account of any additional breach hereunder at any time thereafter, and Provided, (*a*) Railroad Company cannot cancel this contract for any breach of the provisions con-

tained on this paragraph of which Power Company may have no knowledge until ninety (90) days after Railroad Company shall have given Power Company written notice of such breach and Power Company shall have failed to rectify the breach and conform to the terms hereof, and Provided further, (*b*) that any contracts entered into for the sale of electrical capacity or any energy for use outside the corporate limits of said city, (as fixed on the date of entering into said contract), shall not be affected by subsequent extensions of said City limits; and Provided, further (*c*) that nothing herein contained shall apply to sales by Power Company of capacity or energy at any time for light, heat and power for car barn purposes and for any other purposes than for the movement of cars. If Railroad Company shall cancel this contract on account of sale by Power Company of electrical capacity or energy for operating electric railways in the city of Wichita as above provided, then Railroad Company shall, to the extent that Power Company is willing to sell the same, purchase from Power Company such direct current apparatus, switchboards, instruments, and equipment appurtenant thereto as shall then be used primarily for the supply of electrical capacity and energy to Railroad Company hereunder. The price to be paid therefor to be the actual cost of said apparatus, switchboards, instruments and equipment appurtenant thereto as they stand in generating station of Power Company, less a deduction for depreciation at the rate of six per cent (6%) per annum upon said actual cost from the date of the several expenditures made on account of the purchase and erection (ready for operation) of said direct current apparatus, switchboards, instruments and appurtenances.

17. This agreement shall be binding upon and shall inure to the benefit of the respective successors and assigns of the parties hereto.

18. The failure of either of the parties hereto to enforce from time to time the strict performance of any covenant herein contained, or the waiving from time to time of a default on the part of either of the parties hereto shall not be construed as a waiver of any continuing or subsequent defaults nor impair the right of either
21 of the parties hereto to subsequently require the strict performance of each and every covenant herein contained.

In witness whereof, the parties hereinto have caused this agreement to be duly executed by their respective officers thereunto duly authorized the day and year first above written.

KANSAS GAS AND ELECTRIC COMPANY,
By F. G. SYKES, *Vice-Pres.*
WICHITA RAILROAD AND LIGHT COMPANY,
By W. B. McKINLEY, *President.*

Attest:
M. H. ARNING,
[SEAL.] *Asst. Secretary.*

Attest:
E. A. MacNUTT,
[SEAL.] *Secretary.*

"EXHIBIT C."

(*Application of the Kansas Gas and Electric Company for Permission to Add a Surcharge to Certain of Its Rates for Electricity in Kansas.*)

Filed 22nd Day of Jan., 1918.

Before the Kansas Public Utilities Commission.

Docket No. 2344.

PUBLIC UTILITIES COMMISSION, STATE OF KANSAS, by CARL W. MOORE, Secy.

In the Matter of the Petition of KANSAS GAS AND ELECTRIC COMPANY for Permission to Add a Surcharge to Certain of Its Rates for Electricity.

Now comes Kansas Gas and Electric Company and represents to your Honorable Commission that your petitioner's schedules of rates for electricity now in force in the State of Kansas, were filed with your Commission on or about the 4th day of May, 1914; that said rates were based upon the cost of producing and distributing electrical energy at said time, and were intended to and did yield your
22 petitioner a reasonable return only upon the value of its property used and usable in producing and distributing such electrical energy in the State of Kansas. Your petitioner represents that since the date of the filing of said schedules of rates, the cost to your petitioner of producing and distributing such electrical energy has increased enormously on account principally of the increased cost of fuel and of labor, resulting in a large measure from the unusual conditions which exist throughout the country, due to the fact that the nation is engaged in war. As the result thereof the cost to your petitioner of producing such energy for the year ending December 31, 1917, was approximately 100 per cent greater than the cost of production in the year 1914, at which time normal conditions prevailed. Your petitioner is unable to obtain any information indicating that conditions will improve during 1918, but is informed and believes that the costs of production and distribution will increase rather than diminish at least until the termination of the war. On account of such increase in the cost of production and distribution, the net income of your petitioner for the year ending December 31, 1917, was approximately $190,000.00 less than it would and should have been if your petitioner had been able to operate under the normal conditions that existed in 1914; at which time its said rates were first installed as aforesaid; that if said rates are continued in effect hereafter the result thereof will be disastrous to your petitioner, depriving it of a reasonable return upon the value of its said property, and making it impossible to find a market for the securities which it must issue and sell in order to provide funds

with which to make improvements, additions and betterments which are necessary, if it is to furnish proper and adequate service to the *commodities* in which it operates.

Your petitioner further represents that in December, 1916, being of the opinion that it would be able to reduce its rates for electricity for residential and commercial lighting, it filed a schedule of rates with your Honorable Commission, under which it proposed to put in effect a gradual reduction in such rates extending over a period of three years. With said proposed schedule your petitioner filed its petition requesting that your Honorable Commission make an order authorizing your petitioner to make said new rates effective. No order has yet been made by your honorable Commission granting such application. However, your petitioner on January 1st,
23 1917, reduced its said rates for residential and commercial lighting, in accordance with said proposed schedules, and if reductions proposed by said schedules are to continue to be made as provided therein, then an additional reduction should be made for electricity furnished for residential and commercial lighting for the year 1918, beginning January 1st. Your petitioner estimates that the effect of such proposed reduction for the year 1918 will further reduce its net earnings in the sum of approximately $30,000.00. Therefore, if your Honorable Commission should now make its order directing your petitioner to reduce its rates for residential and commercial lighting in accordance with said rate schedules of December, 1916 the loss of net earnings to your petitioner on account of the increased cost of production and distribution and on account of said reduction, will amount for the year 1918 to at least the sum of $220,000.00.

Your petitioner is of the opinion that in order to meet this situation, and in order to increase the net earnings of your petitioner in an amount sufficient to offset the loss resulting to it from the conditions above stated, an order should be entered by the Commission authorizing petitioner to add to its existing rates the surcharge hereinafter set out. There are approximately 19,900 consumers now served by your petitioner; the proposed surcharge does not affect consumers using 100 kilowatt hours or less per month, and, therefore, 17,000 of said total of 19,900 consumers are not affected. In apportioning the surcharge equitably among the remainder of said consumers, your petitioner has taken into consideration the fact that in the generation of electrical energy for large power consumers fuel is approximately 75 per cent of the cost of the generation, and that, therefore, a surcharge which has for its purpose the reimbursement of the utility company for increase in the cost of fuel, should be so adjusted that the surcharge should increase in proportion to the amount of energy consumed. The percentage of increase fixed by such surcharge over existing rates is, therefore, increased in proportion to the amount of consumption. The last step in said surcharge schedule affects 6 consumers, and the last two steps affect 38 consumers.

Wherefore, your petitioner asks that an order be made by your Honorable Commission authorizing your petitioner to add to its exist-

ing rates for electricity in the State of Kansas, and until the
21 further order of the Commission the following surcharges:

For the first	100	kwh per month,	no surcharge.	
for the next	1,000	" " "	12 mills	net per kwh.
" " "	10,000	" " "	9.5 "	" " "
" " "	1,000,000,	" " "	8. "	" " "
For all excess		" " "	3.5 "	" " "

Respectfully submitted,

KANSAS GAS AND ELECTRIC COMPANY,
By McCUNE, CALDWELL & DOWNING,
Its Attorneys.

STATE OF KANSAS,
Shawnee County, ss:

I, Carl W. Moore, hereby certify that I am the duly appointed, qualified and acting secretary of the Public Utilities Commission for the State of Kansas, and that, acting in my official capacity, I have in my direct charges all of the records and files of said office.

That the attached is a true and correct copy of the application of the Kansas Gas and Electric Company for permission to add surcharge to certain of its rates for electricity, Docket No. 2344, as the same appears of record in this office.

In witness whereof I have hereunto set my hand and affixed the official seal of the Public Utilities Commission for the State of Kansas, this 6th day of January, A. D. 1919.

[SEAL.] CARL W. MOORE,
Secretary of the Public Utilities Commission for the State of Kansas.

(Endorsed: Bill of Complaint; Filed in the U. S. District Court, April 24, 1918.)

22 (*Petition of Kansas Gas and Electric Company for Leave to Intervene.*)

No. 259.

WICHITA RAILROAD AND LIGHT COMPANY, a Corporation, Plaintiff,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS, Defendant; Kansas Gas and Electric Company, a Corporation, Petitioner.

Now comes the above named petitioner, Kansas Gas and Electric Company and represents to the court that it has an interest in the matter being litigated in this case, and is a necessary and proper

party to a complete determination of the cause, and respectfully requests the court for leave to file its intervening petition herein, which intervening petition accompanies this petition, and that the court make an order that service of a copy of said intervening petition upon the parties hereto may be had by delivering a copy thereof to their solicitors, and that upon the delivery of a copy of the said petition to the solicitors of the plaintiff, it shall on or before 15 days plead thereto.

KANSAS GAS AND ELECTRIC COMPANY,
By McCUNE, CALDWELL & DOWNING,
Its Solicitors.

We hereby acknowledge receipt of a copy of the foregoing petition for leave to intervene, and of intervening petition attached thereto, and we consent that the said petition for leave to intervene may be presented to the court without further notice.

____ ____,
Solicitors for Plaintiff.

____ ____,
Solicitor for Defendant.

Endorsed: Filed in the District Court on February 7, 1919.

(*Order Granting the Kansas Gas and Electric Company Leave to Intervene.*)

Now on this 7th day of February, 1919, the petition of Kansas Gas and Electric Company, praying for leave to intervene in this case, and for other relief, being before the court for consideration,

26 It is ordered, that the petitioner have leave to file herein its intervening petition, and that service of a copy of said petition may be had upon the parties hereto, by delivering a copy thereof to their respective solicitors, and that upon the delivery of a copy of the said petition to the solicitors for the plaintiff, the plaintiff shall within 15 days thereafter plead thereto, to which order the Plff. excepts.

JOHN C. POLLOCK,
Judge.

Dated Feby. 7th, 1919.

Endorsed: Filed in the District Court on February 7, 1919.

Intervening Petition of Kansas Gas and Electric Company.

No. 259.

WICHITA RAILROAD AND LIGHT COMPANY, a Corporation, Plaintiff,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS, Defendant.

Now comes Kansas Gas and Electric Company, Intervenor herein, and alleges:

1. That it is and was at all the times hereinafter mentioned, a corporation duly organized and existing under and by virtue of the laws of the State of West Virginia, and is and was duly licensed and authorized to do business in the State of Kansas, and is and was at said times engaged among other things in the business of furnishing electric light and power to consumers in the State of Kansas, and particularly in the city of Wichita in said State.

2. That the plaintiff, the Wichita Railroad and Light Company is and was at all the times hereinafter mentioned, a corporation organized and existing under the laws of the State of West Virginia, and engaged in carrying on the business of a street railway in the said city of Wichita, Kansas.

3. That the defendant, The Public Utilities Commission of the State of Kansas, is a board or commission created and existing under and by virtue of an act of the Legislature of the State of Kansas passed in the year 1911, and being chapter 238 of the Laws of Kansas 1911; and that said defendant, the Public Utilities Commission, is and has been, since the passage of said law, vested with full power, authority and jurisdiction to supervise and control
27 public utilities doing business in the State of Kansas, and to fix and regulate the rates to be charged by said Utilities for service, said power, authority and jurisdiction having been delegated by the State of Kansas, by said act of the Legislature, to said defendant Public Utilities Commission.

4. That plaintiff is a consumer of electric current in the said city of Wichita; that on the 2nd day of May, 1910, plaintiff and intervenor entered into a written contract by the terms of which, for a period expiring November 30, 1930, intervenor agreed to furnish and plaintiff agreed to receive and pay for electrical capacity and energy necessary in the operation of the street railroad system of the plaintiff in the said city of Wichita; that said contract fixed the rates to be paid by plaintiff to intervenor for said service. A true copy of said contract is attached to plaintiff's bill of complaint and marked Exhibit "B." That since the date when said contract became effective, and up to and including the present time, the said plaintiff

has received from intervenor, electrical capacity and energy necessary for the operation of its said railroad.

5. That prior to the 25th day of March, 1918, the intervenor filed with the defendant, the Public Utilities Commission of the State of Kansas, its application, copy of which is attached to plaintiff's bill of complaint, marked Exhibit "C"; that in said application intervenor represented that the rates of intervenor then in force, were based upon the cost of producing and distributing electrical energy during normal times, and was then intended to yield and did yield to the intervenor a reasonable return only upon the value of its property used and usable in producing and distributing electrical energy in the State of Kansas; that on account of the unusual conditions existing due to the fact that the nation was at war, the cost *of* intervenor of producing and distributing electrical energy had increased enormously, principally on account of the increased cost of fuel and of labor; that if intervenor's existing rates were continued in effect under conditions then existing, the result would be to deprive the intervenor of a reasonable return upon the value of its property, and intervenor prayed the Commission for an order authorizing petitioner to add a surcharge to its existing rate sufficient to reimburse the intervenor for the increase in the cost of fuel due to said war conditions.

6. That after the filing of said application the defendant, Public Utilities Commission, after due and legal notice to all parties
28 concerned, including the plaintiff, entered upon a hearing of said application; that at said hearing plaintiff was present and participated; that at said hearing evidence was introduced in support of and in opposition to said application, and the defendant Commission, after a full investigation, and being fully advised in the premises, on the 25th day of March, 1918, entered its order by the terms of which it found that intervenor should be authorized and permitted to add to its existing rates for electricity supplied by it to consumers in the State of Kansas, until the further order of the Commission, the following net surcharges:

For the first 100 kwh per month no surcharge.
For the next 14,900 kwh per month, 1 mill surcharge per kwh.
For the next 20,000 kwh per month, 2 mills surcharge per kwh.
For all excess over 35,000 kwh per month 3 mills surcharge per kwh.

And said order further authorized and permitted intervenor to add to its existing rates for electricity the said surcharge until the further order of the Commission. That said order has not been revoked or modified, and is in full force and effect. A copy of said order is hereto attached marked "Exhibit A."

7. That by reason of said order of defendant Public Utilities Commission, intervenor is authorized and entitled to charge and collect from plaintiff for electrical capacity and energy furnished to plaintiff, under said contract, in addition to the rates fixed in said con-

tract, the surcharge fixed in said order of March 25, 1918. That said defendant Public Utilities Commission in making said order in all respects lawfully exercised the power delegated to and vested in it by the laws of the State of Kansas, giving to it full power, authority and jurisdiction to supervise and control the public utilities doing business in the State of Kansas, and to fix just and reasonable rates to be charged by such utilities for the service rendered by them as aforesaid; and did by said order fix just and reasonable rates to be charged by intervenor.

8. That since said surcharge order became effective, to-wit April 1st, 1918, and up to and including December 31, 1918, the electrical energy furnished by intervenor and received and consumed by plaintiff, amounts to 3,179,689 kilowatt hours; and that the surcharge due from plaintiff to intervenor under said order of the Public
29 Utilities Commission on account of the energy so furnished, amounts to the sum of $9,088.18; that plaintiff, although often requested, has refused to pay the said amount or any part thereof, and is resisting the payment thereof in this cause.

9. That on the 26th day of April, 1918, this court, upon the application of the plaintiff, issued its temporary restraining order, restraining and enjoining the defendant Public Utilities Commission of the State of Kansas from enforcing or attempting to enforce the said order of the Commission of March 25, 1917; and from putting into effect or attempting to put into effect said order or the rates and added surcharges fixed thereby, insofar as the same affects the plaintiff herein; that said order is still in force and effect; that the effect of said order is to prevent the intervenor from maintaining its suit in a court of law to collect and recover from the plaintiff, money so due intervenor on account of said surcharge order, and on acount of electrical energy so furnished plaintiff by intervenor.

10. That upon the issuance of said temporary restraining order plaintiff filed herein its injunction bond in the penal sum of $20,000.00, which said bond recited that under the order of the Public Utilities Commission of the State of Kansas entered on the 25th day of March, 1918, upon the application of intervenor, plaintiff was required to pay, in addition to the payment of the rates for electricity fixed in said contract, an added surcharge; and that the court had granted a temporary injunction, restraining and enjoining the enforcing or putting into effect of said order insofar as it affected plaintiff; and the condition of said bond being that in case said injunction, upon final hearing, should be found to have been wrongfully issued, the plaintiff would pay to the intervenor said surcharge in accordance with said order of the defendant Public Utilities Commission, from the date when said order took effect, together with all costs and damages ascertained herein to have been sustained by the defendant and the intervenor, or either of them.

11. That intervenor has an interest in the matter being litigated in this case, and is the party entitled to the benefits to be derived

from said order of the Public Utilities Commission, and is the real party injured and damaged by the granting of said injunction.

Wherefore, prays the judgment and decree of the court dissolving said injunction; that the said order of the Public Utilities Commission of March 25th, 1918, be declared in all respects a valid
30 and lawful order, and that the intervenor be authorized and permitted to enforce the same against the plaintiff, and recover from the plaintiff the amount due the intervenor on account of said surcharge for the electrical energy furnished, and for such other and further relief as to the court may seem equitable and just.

KANSAS GAS AND ELECTRIC COMPANY,
Intervenor,
By McCUNE, CALDWELL & DOWNING,
Its Solicitors.

STATE OF MISSOURI,
County of Jackson, ss:

H. P. Wright, being first duly sworn, upon his oath says that he is the President of Kansas Gas and Electric Company; that he has read the foregoing intervening petition, and is acquainted with the facts therein stated, and that the same are true.

H. P. WRIGHT.

Subscribed and sworn to before me this 7th day of February, 1919.
[Notarial Seal.] LLEWELLYN D. JAMES,
Notary Public in and for Jackson County, Missouri.
My commission expires Dec. 6th 1922.

(Here follows copy of Order of Public Utilities Commission which is set out in full as Exhibit "A" attached to the bill of complaint on page 9 of this record.)

Endorsed: Filed in the District Court on February 7, 1919.

(Temporary Restraining Order, April 24, 1918, Restraining the Public Utilities Commission of Kansas from Enforcing Its Order of March 25, 1918, etc.)

Now, on this 24th day of April, A. D. 1918, the above entitled case came regularly on to be heard, on application of the complainant therein, for a temporary restraining order against The Public Utilities Commission of the State of Kansas, J. M. Kinkel, C. F. Foley and Charles Sessions, members thereof, their agents and attorneys, and the Court, having examined the verified bill of complaint filed herein and being fully advised in the premises, finds that a
31 temporary restraining order should be granted as in said complaint prayed;

Wherefore, it is considered and ordered and adjudged by the Court that the defendant, The Public Utilities Commission of the State of Kansas, J. M. Kinkel, C. F. Foley and Charles Sessions, as members thereof, their agents and attorneys be and they are each hereby, until further order of this Court, restrained and enjoined from enforcing or attempting to enforce the order of said commission, dated the 25th day of March, 1918, and from putting into effect or attempting to put into effect said order or the rates and added surcharges fixed thereby, and said order is hereby temporarily restrained and stayed until further order of this Court.

JOHN C. POLLOCK, *Judge.*

Endorsed: Filed in the District Court on April 24, 1918.

(*Stipulation for the Continuance of the Restraining Order, etc.*)

It is hereby stipulated by and between the parties hereto that the restraining order heretofore issued herein and dated April 26, 1918, shall continue and remain in force until the further order of the Court as a temporary injunction, and that the plaintiff shall forthwith execute and deliver a good and sufficient injunction bond to be approved by the Judge of said Court for the benefit of the defendant and Kansas Gas and Electric Company conditioned upon the payment of the surcharge fixed by the order of the defendant in its order made and entered on the 25th day of March, 1918, and for such costs and damages as the defendant or Kansas Gas and Electric Company may sustain by reason of the granting of said temporary injunction should it be finally determined that the same was improperly issued, or that may be awarded them by reason of the granting of said order,

It is further stipulated that the rates existing by contract between the plaintiff herein and Kansas Gas and Electric Company prior to the order complained of in the bill of complaint herein shall be paid by plaintiff to Kansas Gas and Electric Company, and Kansas Gas and Electric Company may receive the same without prejudice to its right to collect in addition thereto the said surcharge should the said injunction upon a final hearing be found to have been wrongfully issued.

32 It is further stipulated and agreed that upon the final hearing in the above entitled cause, which shall be at the earliest convenience of the Court, the transcript of the evidence taken before the Public Utilities Commission at the hearing of the application for said surcharge may be used by either side subject to objection as to competency, relevancy or materiality, and either side may introduce such further competent, relevant and material evidence as it may desire.

FERRY, DORAN & COSGROVE,
Solicitors for Plaintiff.

F. S. JACKSON,
H. L. McCUNE,
Solicitors for Defendant.

Endorsed: Filed in the District Court on May 25, 1918.

(*Answer of the Public Utilities Commission of the State of Kansas.*)

The Defendant, The Public Utilities Commission of the State of Kansas, for its answer to the bill of complaint filed herein says:

I.

Defendant admits that the plaintiff is a corporation and is engaged in carrying on the business of the street railway company in the city of Wichita, Kansas; that defendant is a regulatory body created and existing under and by virtue of the laws of the State of Kansas, with its office at Topeka, Kansas; that at the time the order of the defendant complained of in said petition was made and filed, the Commission was composed of J. L. Bristow, J. M. Kinkel and C. F. Foley, all citizens and residents of the State of Kansas, and that since the rendition and filing of said order J. L. Bristow has resigned and Charles Sessions has been duly appointed and has qualified, and is now a member of said Commission, and is a citizen and resident of the State of Kansas; that the duties and the powers of the Public Utilities Commission of the State of Kansas are defined and prescribed by Chapter 238 of the Session Laws of the State of Kansas for 1911 and amendments thereto; that the amount in controversy in this suit exceeds the sum of Three Thousand Dollars exclusive of interest and costs; that the plaintiff herein is the consumer of large quantities of electric current purchased and used in the city of Wichita, and purchases its said current from Kansas Gas and Electric Company, and that "Exhibit B" attached to
33 plaintiff's Bill of Complaint is a true copy of a contract between plaintiff and Kansas Gas and Electric Company.

Defendant further admits that prior to the 25th day of March, 1918, Kansas Gas and Electric Company filed with the defendant an application for authority to add a surcharge to certain of its rates for electricity, a true copy of which application is attached to plaintiff's bill of complaint marked Exhibit C; that a hearing was had thereon by defendant in which hearing plaintiff participated; that the defendant on the 25th day of March, 1918, made and entered an order, a copy of which is attached to plaintiff's bill of complaint herein.

II.

Defendant, answering the allegations of paragraph "First" of said bill, says that it is without knowledge as to whether the plaintiff conducts its business wholly within the city of Wichita; and defendant denies each and every other allegation in said paragraph contained.

III.

Defendant, answering the allegations of paragraph "Second" denies each and every allegation in said paragraph contained.

IV.

Defendant, answering the allegations of paragraph "Third" of said bill, denies each and every allegation in said paragraph contained.

V.

Defendant, answering the allegations of paragraph "Fourth" of said bill, denies each and every allegation in said paragraph contained.

VI.

Defendant further answering, says that said bill does not contain facts sufficient to constitute a valid cause of action in equity.

34 Wherefore, defendant prays that said bill of complaint be dismissed, and that it have judgment for its costs herein expended.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF KANSAS,
By FRED S. JACKSON AND
H. L. McCUNE,
Its Solicitors.

Endorsed: Filed in the District Court on May 14, 1918.

(*Motion for Judgment on the Pleadings. Filed November* 13, 1918.)

To the Honorable John C. Pollock, Presiding Judge of the District Court of the United States for the District of Kansas, In Chancery Sitting:

Comes now the Wichita Railroad & Light Company, a corporation, plaintiff in the above entitled cause, by Ferry, Doran & Cosgrove, Harris & Harris and Green & Palmer, its solicitors, and files this its motion for the entry of a final judgment and decree in this cause, upon the pleadings, bill, answer and stipulation, of record herein.

And in support of its motion, the complainant shows:

That the bill in this cause is filed to restrain and enjoin the enforcement of a certain pretended order of the Public Utilities Commission of the State of Kansas, entered March 25, 1918, purporting to become and be effective shortly thereafter, a copy of which said order is attached to and made a part of the original petition herein;

That the defendant admits by its answer that the said purported order of the Public Utilities Commission of the State of Kansas, in controversy in this case is, in the language of the copy thereof attached to the said original petition herein and made a part thereof as an exhibit thereto, as aforesaid;

That there is no controversy nor dispute between the parties to this cause as to the exact language of the said order of the said Public Utilities Commission;

And the plaintiff respectfully shows to the Court that the said order of said Commission, the enforcement of which is sought to be restrained and enjoined in this cause, is herein set forth in the words and figures following, viz:

35 (Here follows copy of Order of Public Utilities Commission which is set out in full as Exhibit "A" attached to the bill of complaint on page 9 of this record.)

And the plaintiff shows that the said order in controversy herein, above set forth, is invalid, void and of no force or binding effect upon the plain iff herein; that the said order is insufficient to authorize the collection by the Kansas Gas and Electric Company of any surcharge or additional rate for service rendered by said Company to the plaintiff; and is insufficient to require the plaintiff to pay to the said Kansas Gas and Electric Company any surcharge or addi ional rate to that already obtaining and in force at the time of the entry of said order and prior thereto;

That the said Public Utilties Commission of the S ate of Kansas was and is wholly without jurisdiction or warrant of law and without authority or right to enter or enforce any order of the character, nature and substance of the pretended order in controversy in this cause;

All of which fully appears from an inspection and examination of the said order itself, and the language, terms and provisions thereof on the face of the same appearing;

Wherefore, the plaintiff shows that the diversity of citizenship between the parties to this cause being admitted, and the amount in controversy being admitted to exceed $3,000 exclusive of costs and interest, and it being admitted in this case that the final and determining issue is the binding effect upon this petitioner of the said order of said Commission above herein set forth, and it appearing from an inspection of the said order that the same is wholly void, insufficient, invalid and without binding effect, the necessity for extended hearing and the in roduction of voluminous, tedious and complicated evidence and proof is wholly unnecessary under the state of the pleadings in this cause, of record appearing in this Court.

And in presenting this motion the plaintiff saves and reserves unto itself, all of its righ's in the presentation of evidence and proof and hearing upon the merits of the issues of fact and law otherwise than as above stated, involved in this cause, in the event it should be determined that final judgment and decree should not be entered pursuant to this motion.

And the plaintiff therefore prays that pursuant to this motion it may be ordered, adjudged and decreed by the Court that the said pretended order of the Public Utilities Commission of the

36 State of Kansas above herein set forth, was and is wholly void, insufficient, invalid and of no binding force or effect; and that it may be further ordered, adjudged and decreed by the Court that the defendant and all persons, corporations, associations, of-

ficers and agents acting under, through or by virtue of the said pretended order of the Public Utilities Commission of the State of Kansas, be forever enjoined and restrained from enforcing or attempting to enforce any of the terms or provisions thereof; and that the petitioner herein be absolved from any and all liability on the bond by it heretofore filed herein.

THE WICHITA RAILROAD AND LIGHT COMPANY,
A Corporation.
By FERRY, DORAN & COSGROVE, HARRIS & HARRIS, GREEN & PALMER,
Its Solicitors.

Endorsed: Filed in the District Court on November 13, 1918.

(*Motion for Judgment on the Pleadings. Filed March* 5, 1919.)

No. 259.

WICHITA RAILROAD AND LIGHT COMPANY, a Corporation, Plaintiff,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS, Defendant; Kansas Gas and Electric Company, a Corporation, Petitioner.

To the Honorable John C. Pollock, Presiding Judge of the District Court of the United States, for the District of Kansas, in Chancery Sitting:

Comes now The Wichita Railroad and Light Company, a corporation, by Ferry & Doran, Harris & Harris, and Green & Palmer, its solicitors, and files this its Motion for the entry of a final judgment and decree in this cause, upon the intervening petition of The Kansas Gas and Electric Company, designating itself herein as Petitioner, and the Bill of Complaint, and the Answer of the Defendant The Public Utilities Commission of the State of Kansas, and the Stipulation of record herein, and upon the Motion hereinbefore filed by this plaintiff for an entry of final judgment and decree in this cause directed against the defendant, The Public Utilities Commission of the State of Kansas.

37 And in support of its motion, Complainant shows that the Bill in this cause is filed to restrain and enjoin the enforcement of a certain pretended order of The Public Utilities Commission of the State of Kansas, entered March 25th, 1918, purporting to become and be effective shortly thereafter; a copy of which order is attached to and made a part of the original petition herein; and also copied into and made a part of plaintiff's motion for judgment on the pleadings heretofore filed herein as against the defendant, The Public Utilities Commission of the State of Kansas; and also

attached to the intervening petition of the Petitioner, The Kansas Gas and Electric Company, as Exhibit A.

That the Petitioner, The Kansas Gas and Electric Company, in its intervening petition herein admits that said purported order of The Public Utilities Commission of the State of Kansas in controversy in this case, is in the language of the copy thereof attached to the original petition, and as copied into said motion for judgment heretofore filed herein, and also attached to said the Kansas Gas and Electric Company's intervening petition herein, as Exhibit A. That there is no controversy or dispute between the parties to this cause, as now constituted, as to the exact language of said order of said the Public Utilities Commission of the State of Kansas.

And plaintiff further shows that said order in controversy herein, above set forth, is invalid, void and of no force or binding effect upon the plaintiff herein; that said order is insufficient to authorize the collection by The Kansas Gas and Electric Company of any surcharge or additional rate for service rendered by said company to the plaintiff, and is insufficient to require the plaintiff to pay to said intervenor, The Kansas Gas and Electric Company, any surcharge or additional rate to that already obtaining and in force at the time of the entry of said order, and prior thereto.

That said public Utilities Commission of the State of Kansas was and is wholly without jurisdiction or warrant of law, and without authority or right to enter or enforce any order of the character language and substance of the pretended order in controversy in this cause, all of which fully appears from an inspection and examination of said order, itself, and the language, form and provisions thereof, on the face of the same appearing.

Plaintiff further shows that the defendant, The Public Utilities Commission of the State of Kansas, was without authority or jurisdiction under the law to enter any order of any character
38 whatever in the premises; that if Chapter 238 of the Session Laws of Kansas, 1911, is an effective and valid law, The Kansas Gas and Electric Company is not a proper or necessary party to this action, and has no right to intervene or be heard in the premises; that its interest in said order and the benefits it may derive therefrom is contingent upon the validity thereof, and that the validity thereof is under said Chapter 238 of the Session Laws of Kansas, 1911, determinable solely between the parties named in said statute as the proper and necessary parties to an action of this character.

Wherefore, Plaintiff shows that the diversity of citizenship between the parties to this cause being admitted, and the amount in controversy being admitted to exceed three thousand dollars, exclusive of interest and costs, and it being admitted in this case that the final and determining issue is the binding effect upon this plaintiff of said order of said Commission as above set forth, and it appearing from inspection of said order that the same is wholly void, insufficient, invalid and without binding effect, the necessity for extended hearing, and the introduction of voluminous, tedious and complicated evidence and proof is wholly unnecessary under the state of the pleadings in this cause of record appearing in this court, and in pre-

senting its motion, plaintiff saves and reserves to itself all of its rights in the presentation of evidence and proofs and hearing upon the merits of the issues of fact and law, otherwise than as above stated, involved in this cause, in the event it should be determined that final judgment and decree should not be entered pursuant to this motion and a similar motion filed herein by plaintiff against the defendant, The Public Utilities Commission of the State of Kansas.

And the plaintiff, therefore, prays that pursuant to this motion it may be ordered, adjudged and decreed by the Court that said pretended order of The Public Utilities Commission of the State of Kansas, as set for h in the pleadings herein, was and is wholly void, insufficient, invalid and of no binding force or effect; and that it may be further ordered, adjudged and decreed by the Court, that the defendant and the intervening petitioner, The Kansas Gas and Elec ric Company, and all persons, corporations, associations, officers and agents acting under, through or by virtue of said pretended order of The Public Utili ies Commission of the State of Kansas, be forever enjoined and restrained from enforcing or attempting to enforce any of the terms or provisions thereof; and that the
39 plaintiff herein be absolved from any and all liability on the bond which it heretofore filed herein.

THE WICHITA RAILROAD AND LIGHT COMPANY,
A Corporation,

By FERRY & DORAN,
HARRIS & HARRIS,
GREEN AND PALMER,
Its Solicitors.

Endorsed: Filed in the District Court on March 5, 1919.

(*Opinion of the District Court on Motions for Judgment on the Pleadings.*)

This is a suit to enjoin the enforcement of certain surcharge rates allowed by The Public Utilities Commission of the state on application of intervener herein, The Kansas Gas & Electric Company. The facts are:

On May 2, 1910, a contract was entered into between plaintiff and intervener herein fully setting forth in detail the respective rights, powers, duties and obligations of the parties thereto in regard to the sufficiency, nature and extent of the service required by plaintiff from intervener, and further, the rates of charge for the service so to be performed. Under the terms of this contract from the date it was made until the making of the order by the Commission complained of herein, the parties fully kept, performed and abided by said contract. In express terms, this contract was to remain in force between the parties thereto until November 30, 1930. Notwithstanding this contract, and the solvency and the ability of the parties to perform its obligations, intervener on January 22, 1918, filed and presented to The Utilities Commission of the State its application to

surcharge rates of certain consumers of electricity, among others, the rates fixed by the contract between the parties. Said application reads as follows:

Filed 22nd day of Jan., 1918.

"Before the Kansas Public Utilities Commission.

Docket No. 2344.

PUBLIC UTILITIES COMMISSION, STATE OF KANSAS, by CARL W MOORE, Secy.

40 In the Matter of the Petition of KANSAS GAS AND ELECTRIC Company for Permission to Add a Surcharge to Certain of Its Rates for Electricity.

Now comes Kansas Gas and Electric Company and represents to your Honorable Commission that your petitioner's schedules of rates for electricity now in force in the State of Kansas, were filed with your Commission on or about the 4th day of May, 1914; that said rates were based upon the cost of producing and distributing electrical energy at said time, and were intended to and did yield your petitioner a reasonable return only upon the value of its property used and usable in producing and distributing such electrical energy in the State of Kansas. Your petitioner represents that since the date of the filing of said schedule of rates, the cost to your petitioner of producing and distributing such electrical energy has increased enormously on account principally of the increased cost of fuel and of labor, resulting in a large measure from the unusual conditions which exist throughout the country, due to the fact that the nation is engaged in war. As the result thereof the cost to your petitioner of producing such energy for the year ending December 31, 1917, was approximately 100 per cent greater than the cost of production in the year 1914, at which time normal conditions prevailed. Your petitioner is unable to obtain any information indicating that conditions will improve during 1918, but is informed and believes that the cost of production and distribution will increase rather than diminish at least until the termination of the war. On account of such increase in the cost of production and distribution, the net income of your petitioner for the year ending December 31, 1917, was approximately $190,000.00 less than it would and should have been if your petitioner had been able to operate under the normal conditions that existed in 1914, at which time its said rates were first installed as aforesaid; that if said rates are continued in effect hereafter the result thereof will be disastrous to your petitioner, depriving it of a reasonable return upon the value of its said property, and making it impossible to find a market for the securities which it must issue and sell in order to provide funds with which to make improvements, additions and betterments which are necessary, if it is

to furnish proper and adequate service to the communities in which it operates.

Your petitioner further represents that in December, 1916, being of the opinion that it would be able to reduce its rates for electricity for residential and commercial lighting, it filed a schedule of
41 rates with your Honorable Commission, under which it proposed to put in effect a gradual reduction in such rates extending over a period of three years. With said proposed schedule your petitioner filed its petition requesting that your Honorable Commission make an order authorizing your petitioner to make said new rates effective. No order has yet been made by your Honorable Commission granting such application. However, your petitioner on January 1, 1917, reduced its said rates for residential and commercial lighting, in accordance with said proposed schedules and if reductions proposed by said schedules are to continue to be made as provided therein, then an additional reduction should be made for electricity furnished for residential and commercial lighting for the year 1918, beginning January 1st. Your petitioner estimates that the effect of such proposed reduction for the year 1918 will further reduce its net earnings in the sum of approximately $30,000.00. Therefore, if your Honorable Commission should now make its order directing your petitioner to reduce its rates for residential and commercial lighting in accordance with said rate schedules of December, 1916, the loss of net earnings to your petitioner on account of the increased cost of production and distribution and on account of said reduction, will amount for the year 1918, to at least the sum of $220,000.00.

Your petitioner is of the opinion that in order to meet this situation, and in order to increase the net earnings of your petitioner in an amount sufficient to offset the loss resulting to it from the conditions above stated, an order should be entered by the Commission authorizing petitioner to add to its existing rates the surcharge hereinafter set out. There are approximately 19,900 consumers now served by your petitioner; the proposed surcharge does not affect consumers using 100 kilowatt hours or less per month, and therefore, 17,000 of said total of 19,900 consumers are not affected. In apportioning the said surcharge equitably among the remainder of said consumers, your petitioner has taken into consideration the fact that in the generation of electrical energy for large power consumers fuel is approximately 75 per cent of the cost of the generation, and that, therefore, a surcharge which has for its purpose the reimbursement of the utility company for increase in the cost of fuel should be so adjusted that the surcharge should increase in proportion to the amount of energy consumed. The percentage of increase fixed by such surcharge over existing rates is, therefore, increased in proportion
42 to the amount of consumption. The last step in said surcharge schedule affects 6 consumers, and the last two steps affect 38 consumers.

Wherefore, Your petitioner asks that an order be made by your Honorable Commission authorizing your petitioner to add to its existing rates for electricity in the State of Kansas, and until the further order of the Commission, the following surcharges:

For the first 100 kwh per month, no surcharge.
For the next 1,000 " " " 12 mills net per kwh.
" " " 10,000 " " " 9.5 " " " "
" " " 100,000 " " " 8 " " " "
For all excess " " " 3.5 " " " "

Respectfully submitted,

KANSAS GAS AND ELECTRIC COMPANY,
By McCUNE, CALDWELL & DOWNING,
Its Attorneys."

Thereafter, and on March 25, 1918, the following order was made by the Commission:

"At a Regular Session of the Public Utilities Commission for the State of Kansas, Held in Its Office, at Topeka, Kansas, This 25th Day of March, A. D. 1918.

Joseph L. Bristow,
John M. Kinkel,
C. F. Foley,
Commissioners.

Docket No. 2344.

In the Matter of the Application of the Kansas Gas and Electric Company for Permission to Add a Surcharge to Certain of Its Rates for Electricity.

Order.

Be it remembered, That on this 25th day of March, A. D. 1918, the matter of the application of the Kansas Gas and Electric Company for permission to add a surcharge to certain of its rates for electricity, came duly on for order by the Commission upon the pleadings of the respective parties and the evidence introduced thereunder; and the Commission, upon consideration of said pleadings and evidence, and being duly advised in the premises, finds that the Kansas
43 Gas and Electric Company should be authorized and permitted to add to its existing rates for electricity supplied by it to consumers in the state of Kansas, until the further order of the Commission, the following net surcharge:

For the first 100 KWH per month no surcharge.
For the next 14,900 KWH per month 1 mill surcharge per KWH.
For the next 20,000 " " " 2 mills surcharge per KWH.
For all excess over 35,000 KWH per month 3 mills surcharge per KWH.

The Commission further finds that, until its further order herein, each substation of the Arkansas Valley Interurban Railway Com-

pany should not be considered as a separate unit but that monthly bills should be rendered and collected for the aggregate of all current delivered by the Kansas Gas and Electric Company to the Arkansas Valley Interurban Railway Company considered and treated as one customer, and not for each substation separately.

It is therefore by the Commission considered and ordered:

That the Kansas Gas and Electric Company be, and it hereby is, authorized and permitted to add to its existing rates for electricity supplied by it to consumers in the State of Kansas, until the further order of the Commission, the following net surcharges:

For the first 100 KWH per month no surcharge.
For the next 14,900 KWH per month 1 mill surcharge per KWH.
For the next 20,000 " " " 2 mills surcharge per KWH.
For all excess over 35,000 KWH per month 3 mills surcharge per KWH.

It is further by the Commission considered and ordered:

That, until its further order herein, each substation of the Arkansas Valley Interurban Railway Company shall not be considered as a separate unit, but that monthly bills shall be rendered and collected for the aggregate of all current delivered by the Kansas Gas and Electric Company to the Arkansas Valley Interurban Railway Company considered and treated as one customer, and not for each substation separately.

By order of the Commission.

CARL W. MOORE,
Secretary.

O. K.
JOSEPH L. BRISTOW,
JOHN M. KINKEL,
C. F. FOLEY,
Commissioners."

This suit was brought by plaintiff against the Commission to restrain it from putting into effect the rates charged for serv-
44 ice performed as in said order stated. A restraining order was granted on the filing of the suit. Thereafter, the Commission, through its representative, in open court, having announced it was neither threatening nor about to put said increased rates into effect, and did not intend to so do in future, the Kansas Gas and Electric Company, on whose application and for whose use and benefit the order was made by the Commission, asked leave to intervene in this suit and take up the litigation with the plaintiff as to the validity of the order made.

The matter has been fully argued, briefed and submitted on motion of plaintiff for decree on the petition and answer of the Commission and for an order dismissing the intervening petition of the Kansas Gas & Electric Company.

It is the contention of the plaintiff the order of the Commission as made is void on its face for the following reasons:

(1) The Public Utilities Commission had no power to change the rates fixed in the contract between the parties which contract was entered into, and in full force and effect long before the law under which the Commission was created and its powers and duties were conferred was passed by the legislature of the state;

(2) The order of the Commission is void on its face for the reason it fails to contain any finding of jurisdiction in the Commission or the finding of any fact justifying its action, or furnishing any basis for the order made in this case;

(3) The act of Kansas creating the Public Utilities Commission is unconstitutional and void for the reason it attempts to vest and commingle in one Commission or body both legislative and judicial powers and jurisdiction in contravention of the Constitution of this State.

Coming now to a consideration of the grounds stated, it may be said: A reading and consideration of the briefs and arguments of solicitors for the respective parties, and a reference to the many adjudicated cases cited and quoted from leaves no room for doubt whatever but that contracts between public utility corporations, similar to that involved in this case, are not in all things afforded such full and complete protection against impairment of their obligations by subsequent legislative enactment of a state, under article 1, section 10 of the National Constitution as is afforded purely private contracts between individual citizens or corporate bodies. And this by reason of the fact all such contracts are entered into by the parties in view of the reserved police power of the state to protect the public health, safety, welfare, morals &c. of its citizens. And although such a contract when entered into may have been in all and every respect valid, binding and enforcible in law as between the parties thereto, yet if by reason of subsequent events its enforcement as written may become unreasonable, oppressive and injurious to the public, or operate to discriminate in favor of a party thereto as against other members of the public; or, operate to deprive a public service corporation of its ability and power to discharge its public duties, obligations and functions; or, by the enforcement of such contract the safety, health, comfort, convenience or morals of the public become endangered, and in all such like cases, that the state in the exercise of its reserved police power may step in and regulate the performance of the contract and may change or regulate the contract rates to be paid for the service performed, must be conceded by all. And this for the reason, all contracts are made in view of existing law and the right of the state to impair the obligation of contracts in the exercise of its reserve police power, because a part of the contract when entered into, therefore the exercise of such right is excepted from the general prohibition found in article 1, section 10 of the Constitution against the impairment of existing contracts by legislative enactment.

A few quotations from leading cases will amply sustain this position.

In Chicago &c. Railroad vs. Nebraska, 170 U. S. 57, Mr. Justice Shiras delivering the opinion for the court, on page 72, said:

"Usually, where a contract, not contrary to public policy, has been entered into between parties competent to contract, it is not within the power of either party to withdraw from its terms without the consent of the other; and the obligation of such a contract is constitutionally protected from hostile legislation. Where, however, the respective parties are not private persons, dealing with matters and things in which the public has no concern, but are persons or corporations, these rights and powers were created for public purposes, by legislative acts, and where the subject-matter of the contract is one which affects the safety and welfare of the public, other principles apply. Contracts of the latter description are held to be within the supervising power and control of the legislature when
46 exercise to protect the public safety, health and morals, and that clause of the federal constitution which protects contracts from legislative action cannot in every case be successfully invoked. The presumption is that when such contracts are entered into it is with the knowledge that parties cannot, by making agreements on subjects involving the rights of the public, withdraw such subjects from the police power of the legislature."

In Portland Ry. Co. vs. Oregon R. R. Comm. 229 U. S., 397, Mr. Justice Day delivering the opinion for the court, at page 410, said:

"The authority of the states to control by appropriate legislation the rates of fares to be charged by street railway companies and other common carriers wholly within their borders and subject to their laws is unquestionable. In the legitimate exercise of such authority we see no reason why a state may not consistently with due process of law prohibit any unjust discrimination by a domestic railroad company against certain localities upon its lines."

The question presented on this record, however, does not so much concern itself with the power of the state to authorize its creature, the Public Utilities Commission, to change or abrogate a valid contract rate lawfully made between public service corporations, and in full force, effect and operation at the date the law creating the Public Utilities Commission was enacted, under its reserved police powers to preserve the public health, morals &c., or to prevent unjust, unreasonable and extortionate or discriminatory rates of charge for service, and the like, but conceding this right of the state, rather concerns itself in this case with the question, do the facts of this case as pleaded and shown on this record, call for the exercise of any such power on the part of the Public Utilities Commission as an agency of the state; or, do the facts pleaded, stated or disclosed by this record justify The Commission in the making of the order made in this case abrogating and changing the contract rate.

Recurring now to the application above set forth made by intervener to the Public Utilities Commission, we do not find therein

charged or stated any claim of discrimination between the rates fixed in the contract and those charged other members of the body public for like service, nor is it there alleged or charged if the contract is carried out and performed between the parties as written, and the rates for the service therein contracted are paid,
47 any injury, damage, inconvenience, or injustice will result to the public. Nor do we find it there charged the ability of intervener to discharge any and all of its public duties, functions and obligations will be in the slightest degree impaired. No charge of insolvency of intervener is alleged which would impair its ability to carry out and perform its duties to the public, or that if the contract rates sought to be changed or abrogated will, if received during the life of the contract, render intervener insolvent or fail to give intervener adequate compensation for the public service performed. On the contrary, it will be there found, all that is alleged is, the cost and expense of furnishing the service contracted for has by reason of [was] conditions been greatly enhanced, and if certain other contemplated orders are made by the Commission the net revenues of intervener will be generally impaired unless the Commission orders the surcharge rates made effectual. Wherefore, it is asked the same be ordered.

Coming now to the order of the Commission itself, it is found no jurisdictional fact- calling its statutory powers into action are stated; no finding of unreasonableness of the contract rates existing between the parties is made; no finding the same are in their nature discriminatory, unreasonable, unjust, or the carrying out of the contract will in any manner, form or [*way*] injuriously affect public interest, public health, public safety, public convenience, or any other finding except the mere will of the Commission that the same will be surcharged.

In view of the application made to the Commission by one of the parties to this contract, and the order made by the Commission as set forth, and conceding for the purposes of the determination of this case alone the entire validity of the act of the legislature under which the Public Utilities Commission of the state was created and its powers conferred, although much doubt might be cast upon that proposition by the elaborate briefs filed by the plaintiff, yet, even so, I am convinced the order of the Commission in this case is void on its fase and of no effect, for two reasons: (1) Because there is neither found nor stated therein any reason, ground or justification for annulling and abrogating the contract between the parties, valid when made and in full force, effect and operation when the Public Utilities Commission came into existence as a creature of the state; (2) for the reason no facts are found or stated in the order of the Commission sustaining or tending to sustain the exercise of its statutory powers and functions as prescribed in the public utilities
48 act; and further, no finding of the reasonableness or unreasonableness of the contract rates existing between the parties is made, and no finding is made showing or tending to show any discrimination between the contract rates and other rates of charge

for service charged other members of the public, or other justification or excuse for the making of the order except the mere caprice or whim of the Commission based on the ground the net revenues of intervener will be temporarily decreased if certain other changes in rates shall in future be made by the Commission.

In regard to the proposition first stated, it may be said: The contract in question was valid when made, was by the parties thereto performed until after the enactment of the Public Utilities Commission law of 1911, and notwithstanding that act has since remained in full force and effect until the order of the Commission attempted to be restrained in this case. The enactment of the Public Utilities law in no manner or way impaired the validity of the contract existing between the parties or affected the rates for service therein stipulated. Kaul vs. Telephone Co. 95 Kan. 1. Conceding the power of the Commission in a proper case to change or modify the schedule of rates therein fixed for the public good under the reserved police power of the state, as before stated, yet, it was not within the power of one of the parties for its own benefit and advantage, acting through an agency of the state created under a subsequent law of the state, to cause the contract to be impaired or abrogated in this vital part. This the legislature itself could do, neither directly nor indirectly because prohibited by the provisions of article 1, section 10, of the national Constitution. For the public safety, health &c, acting under its reserved power, the Public Utilities Commission may by the legislature be empowered to investigate the facts on a proper charge and if the rates prescribed in the contracts are by such tribunal found to be discriminatory and to unjustly affect the public good, then the reserved police power of the state, which entered into and became a part of the contract when made, would work out and compel a change therein; not for the private advantage or use of a party to the contract, as is attempted here by the order made in this case, but for the public good.

As to the second ground of invalidity of the order, the Supreme Court of this State in commenting on the Present Public
49 Utilities Act, its operation and effect, in Kaul vs. Telephone Co., supra, opinion by Chief Justice Johnson, said:

"It is argued that the contract is not enforceable, because of the provisions of the public utilities act recently enacted. (Laws 1911, ch. 238.) Some testimony was introduced to the effect that the contract rates are unreasonable and lower than the defendant is charging other patrons, and also that the defendant has published and filed with the public utilities commission a schedule of its rates, tolls, fares and charges. The contract in question was made long before the act referred to was passed, and was in force when the public utilities commission came into existence, and while that commission is vested with broad regulatory powers it is not shown nor claimed that it has found the contract rates to be unreasonable. Granting, without deciding, that the commission has the power under the law to determine whether or not the rates prescribed by the contract are

reasonable and valid, and to revise them if found to be unreasonable, it does not appear that it has exercised the power, nor that they have been presented to it for its consideration. The passage of the act did not automatically overthrow contracts, nor set aside schedules of rates which had been agreed upon. Neither did the fact that the defendant published and filed a schedule of rates with the public utilities commission abrogate the contract. In any event, rates previously agreed upon between utilities and patrons will continue in force until the commission has found them to be unreasonable, and has prescribed other rates."

In Carron vs. Martin 26 N. J. Law, 594; 69 Am. Dec. 584, it is said:

"Tribunals with special powers for adjudicating in particular cases, under the various names of commissioner, surveyors, appraisers, committees, directors, overseers, and the like, little or in nowise relating to the general administration of justice, whose mode of proceeding are prescribed in the statutes by which they are created, are of a different class (from courts of general jurisdiction); and unless their proceedings on the face of them show a compliance with the directions required by the statute under which they act, it never could be known whether they acted within their jurisdiction or exceeded it."

In Detroit, etc., R. Co. vs. Railroad Com'n, 171 Mich. 355, 137, N. W. 329, 333, the court said:

50 "The legislature has not fixed the freight rates to be charged by complainant beyond this: it has prohibited and made unlawful every unjust and unreasonable charge. It permits reasonable and just rates to be charged for services performed. It has confided to the Michigan Railroad Commission the power, with the duty, to ascertain, in proper cases whether a rate is reasonable and just or unreasonable and unjust, and to thereupon make an order in conformity with the facts. The facts being found, it is the legislature which speaks, approvingly or disapprovingly, as the case may be. The important business of the commission with respect to rates is ascertaining facts. Its findings are not conclusive, but have the effect of establishing prima facie that the rates considered are reasonable and just and therefore lawful, or are unreasonable and unjust and unlawful."

This language is quoted with approval by the Supreme Court of this State in Railroad Co. vs. Utilities Commission, 95 Kan. 604.

In Commissioners vs. Johnson, 39 So. 1910, the Supreme Court of Ala. held:

"The commissioners' court, in the exercise of statutory powers, as were conferred by the act in question, is a court of limited jurisdic-

tion, and to uphold its proceedings under the statute its records must affirmatively show the existence of the facts upon which its authority rests."

As it will be learned from an examination of the Public Utilities Act of the state no charge was brought or presented to the Commission challenging the validity of the contract rates in this case on any ground prescribed in the statute itself, and as there is no finding made by the Commission that any question was presented to or entertained by it on its own motion within its jurisdiction or power to change or correct; and as there is no finding of any fact made by the Commission from the proofs adduced, as they existed in the contract between the parties, was unreasonable, unjust or discriminative, it is apparent the order made by the Commission is void for want of jurisdiction or facts upon which to base the order.

It follows, a decree must go in favor of plaintiff perpetually enjoining the enforcement of the void order of the Commis-
51 sion as prayed in the petition of plaintiff against defendant and intervener.

It is so ordered.

JOHN C. POLLOCK,
Judge.

Kansas City, Kansas,
June 6th, 1919.

Endorsed: Filed in the District Court on June 6, 1919.

(*Decree of the District Court, June* 6, 1919.)

No. 259-N, Equity.

THE WICHITA RAILROAD AND LIGHT COMPANY, a Corporation, Plaintiff,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS, Defendant; The Kansas Gas and Electric Company, a Corporation, Intervening Petitioner.

Now, on this 6th day of June A. D. 1919, the above entitled cause came regularly on for decision, upon the motions of the plaintiff for judgment on the pleadings, both as against the defendant, The Public Utilities Commission of the State of Kansas, and against The Kansas Gas and Electric Company, a corporation, intervening petitioner, and the stipulation of the parties filed herein relative to the temporary restraining order and temporary injunction heretofore granted herein in accordance with said stipulation; the Court, theretofore, on the 13th day of November, 1918, and upon subsequent dates, in open court having heard counsel for the various parties upon said motions of plaintiff for judgment upon the pleadings, and

the stipulation aforesaid; and the Court having thereafter, on April 28, 1919, upon written journal entry of submission, taken said motions under advisement upon full and complete briefs submitted by counsel for the various parties; and the Court, having fully considered said motions and the arguments of counsel thereon, and the briefs and authorities submitted in support of the various contentions of the parties, and being fully advised in the premises, finds:

That the order of the Public Utilities Commission of the State of Kansas, made and entered by said Commission on the 25th day of March, 1918, authorizing and permitting The Kansas Gas and Electric Company to add to its existing rate for electricity supplied by it to its consumers in the State of Kansas, is as to the plaintiff
52 herein, The Wichita Railroad and Light Company, void and unenforceable, and that plaintiff's motions for judgments on the pleadings and stipulation herein should be sustained, both as against the defendant, The Public Utilities Commission of the State of Kansas, and as against the intervening petitioner, The Kansas Gas and Electric Company, for two reasons:

(1) Because there is neither found nor stated in said order any reason, ground or justification for annulling and abrogating the contract between the parties, valid when made and in full force, effect and operation when the Public Utilities Commission came into existence as a creature of the state;

(2) For the reason that no facts are found or stated in the order of the Commission sustaining or tending to sustain the exercise of its statutory powers and functions as prescribed in the public utilities act; and further, no finding of the reasonableness or unreasonableness of the contract rates existing between the parties is made, and no finding is made showing or tending to show any discrimination between the contract rates and other rates of charge for service charged other members of the public, or other justification or excuse for the making of the order except the mere caprice or whim of the Commission based on the ground that the net revenues of intervener will be temporarily decreased if certain other changes in rates shall in the future be made by the Commission.

The Court further finds, that the temporary injunction heretofore granted herein, pursuant to the stipulation of the parties to this action, should be made permanent, perpetually restraining and enjoining the Public Utilities Commission of the State of Kansas and The Kansas Gas and Electric Company, their members, attorneys, agents, officers and employes, from enforcing or attempting to enforce, as against the plaintiff herein, The Wichita Railroad and Light Company, the rates or added surcharges authorized and permitted by said void order of said defendant, The Public Utilities Commission of the State of Kansas, of March 25, 1918.

The court further finds, that the bond heretofore given herein by the plaintiff should be cancelled, and the plaintiff herein, and The Kansas Casualty & Surety Company, surety thereon, should be released from all further liability thereunder or on account thereof.

The court further finds, that the costs of this action should
53 be assessed and paid by the intervening petitioner, The Kansas Gas and Electric Company.

Wherefore, It is ordered, adjudged and decreed by the Court: that the motions of the plaintiff herein for judgment on the pleadings, and the stipulation of the parties hereinbefore mentioned, should be and the same are hereby sustained.

That the order of the Public Utilities Commission of the State of Kansas herein complained of, and dated March 25, 1918, should be, and the same is hereby held, ordered and decreed to be null and void, and without any force or binding effect upon the plaintiff herein, for the reasons hereinbefore found.

That the temporary injunction heretofore entered herein, pursuant to and under the stipulation of the parties to this action, and by order of the court, should be, and the same is hereby made permanent, and that the Public Utilities Commission of the State of Kansas, John M. Kinkel, W. L. Huggins and C. W. Green, the members of said Commission, and F. S. Jackson, attorney for said Commission, and all officers and agents of said Commission, and The Kansas Gas and Electric Company, its officers, attorneys, agents and employes, should be, and each of them are hereby perpetually restrained and enjoined from enforcing or attempting to enforce as against the plaintiff herein, The Wichita Railroad and Light Company, said order of the Public Utilities Commission of the State of Kansas, of March 25, 1918, and any and all of the rates or surcharges mentioned, authorized or permitted to be charged by said order.

It is further ordered, adjudged and decreed by the court, that the bond given by the plaintiff herein should be, and the same is hereby cancelled, and the plaintiff herein, and The Kansas Casualty and Surety Company, surety thereon, are each hereby released and discharged from any and all further liability thereunder.

It is by the court further ordered and decreed, that the costs of this action, taxed at $— shall be paid by The Kansas Gas and Electric Company, intervening petitioner.

To all of which findings, order and decree of the court, the defendant and the intervenor Kansas Gas and Electric Co. excepts.

JOHN C. POLLOCK,
Judge.

Endorsed: Filed in the District Court on June 6, 1919.

54 *Petition for Appeal.*

To the Honorable Judges of the United States District Court for the District of Kansas:

The above named defendant, The Public Utilities Commission of the State of Kansas, and Kansas Gas and Electric Company, Intervening Petitioner, feeling aggrieved by the decree rendered and entered in the above entitled cause on the 6th day of June, 1919, do hereby appeal from said decree to the United States Circuit Court of Appeals for the Eighth Circuit for the reasons set forth in the as-

signment of errors filed herewith, and they pray that their appeal be allowed and that citation be issued as provided by law, and that a transcript of the record proceedings, documents and papers upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Eighth Circuit under the rules of such Court in such cases made and provided.

And your petitioners further pray that the proper order relating to the required security to be required of them be made.

FRED S. JACKSON,
McCUNE, CALDWELL & DOWNING,
Solicitors for Appellants.

Appeal allowed upon giving bond as required by law for the sum of Two Hundred Fifty Dollars as a cost bond only.

JOHN C. POLLOCK,
Judge.

Endorsed: Filed in the District Court on November 28, 1919.

Order Allowing Appeal.

On motion of Henry L. McCune, Esq., solicitor and counsel for complainant, it is hereby ordered that an appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the decree heretofore filed and entered herein be, and the same is hereby allowed, and that a certified transcript of the record, the testimony, exhibits, stipulations, and all proceedings be forthwith transmitted to said Circuit Court of Appeals.

55 It is further ordered that the bond on appeal be fixed at the sum of Two Hundred Fifty Dollars as a cost bond only.

Dated November 28, 1919.

JOHN C. POLLOCK,
Judge.

Endorsed: Filed in the District Court on November 28, 1919.

Assignment of Errors.

The Public Utilities Commission of the State of Kansas, defendant, and Kansas Gas and Electric Company, a corporation, intervener, now appealing from the decree of this Court entered in the above entitled cause on the 6th day of June, A. D., 1919, make and file this their assignment of errors:

1. Said District Court erred in finding and holding void the order of the Public Utilities Commission of the State of Kansas made March 25th, 1918, allowing intervener to collect certain surcharges therein set out for furnishing electric current.

2. Said District Court erred in finding and holding unenforcible as to plaintiff the said order of the Public Utilities Commission of

the State of Kansas authorizing the collection of certain surcharges for electric current.

3. Said District Court erred in adjudicating upon and deciding the validity of the order of the Public Utilities Commission authorizing intervener to collect surcharges simply upon the pleadings and stipulation of the parties without hearing any evidence or examining the record of the hearing of the Public Utilities Commission at which said order was made, whereas the Public Utilities Act of Kansas provides that the Court shall review the case and the stipulation of the parties provided that the transcript of the evidence taken before the Public Utilities Commisssion at such hearing might be used by either side and that either side might introduce such further competent, relative and material evidence as it might desire.

4. Said District Court erred in sustaining plaintiff's motion for judgment and thereby declaring void and enjoining the enforcement of the Public Utilities Commission order on the pleadings and stipulation which contained only the application to the Public Utilities Commission of the State of Kansas and its order made thereon allowing intervener to collect a surcharge for service and said
56 pleadings and stipulation not containing or purporting to contain the evidence or facts upon which the Public Utilities Commission made said order.

5. Said District Court erred in holding that the finding and stating in the order itself the reason, ground and justification for the making of said order were essential and requisite to the validity of the order of the Public Utilities Commission of the State of Kansas dated March 25th, 1918, permitting intervener to collect certain surcharges for electric current.

6. Said District Court erred in declaring and finding and adjudging the said order of the Public Utilities Commission of the State of Kansas of March 25th, 1918, permitting intervener to collect certain surcharges for electric current void and unenforcible by reason of the failure of said order to state the facts or grounds sustaining the exercise of the powers and functions of said Public Utilities Commission.

7. Said District Court erred in holding that it was essential to the validity of the said order of March 25th, 1918, of the Public Utilities Commission of the State of Kansas authorizing intervener to collect certain surcharges for electric current that said order state upon its face a finding of reasonableness or unreasonableness of contract rates existing between plaintiff and intervener, or a finding showing or tending to show discrimination between the contract rates between plaintiff and intervener and other rates of charge to other members of the public or other grounds or justification for the making of said order.

8. Said District Court erred in holding that the rates to be charged for the furnishing of electric current by intervener continued and remained a valid and enforcible element of contract between plain-

tiff and intervener after the passage of the Kansas Public Utility Act and the making by the Public Utilities Commission of the State of Kansas of its order of March 25th, 1918, authorizing intervenor to collect certain surcharges for electric current.

9. Said District Court erred in holding that the existence of the contract between plaintiff and intervener containing recitals of charges to be paid by plaintiff to intervener for electric current prevented in any degree the order of the Public Utilities Commission of the State of Kansas of March 25th, 1918, permitting and directing intervener to charge and collect certain surcharges for the furnishing of electric current from being valid and effective.

57 10. Said District Court erred in enjoining defendant and intervener from putting in force the collection of surcharges for electric current furnished by intervener in accordance with the order of the Public Utilities Commission of the State of Kansas of March 25th, 1918, allowing and permitting it so to do.

11. Said District Court erred in finding and decreeing void and unenforcible in its entirety the order of March 25th, 1918, of the Public Utilities Commission au horizing and directing the collection of certain surcharges by intervener for electric current furnished and providing that each subdivision of the Arkansas Valley Interurban Railway Company should not be considered as a separate unit but that monthly bills should be rendered and collected for the aggregate and that said Company should be treated in its entirety as one customer.

12. Said District Court erred in cancelling the injunction bond executed herein and releasing the obligors therefrom.

Wherefore, the appellants pray that said decree be reversed and that said District Court for the District of Kansas, First Division, *be* ordered to enter a decree reversing the decision of the lower court in said cause and to proceed to hear the case in conformity with such mandate or opinion as the appellate court may render, or that the Supreme Court of the United States shall so reverse and enter a proper decree on the record.

FRED S. JACKSON,
McCUNE, CALDWELL & DOWNING,
Solicitors for Appellants.

Endorsed: Filed in the District Court on November 28, 1919.

(*Bond on Appeal*)

Know all men by these presents: That we, Kansas Gas and Electric Company, a corporation organized under the laws of the State of West Virginia, and doing business in the State of Kansas, as principal, and The American Surety Company of New York, as surety, are held and firmly bound unto The Wichita Railroad and Light

Company, a corporation in the sum of Two Hundred and Fifty Dollars, lawful money of the United States, to be paid to it
58 and its successors and assigns, to which payment well and truly to be made we bind ourselves and each of us jointly and severally, and each of our successors, by these presents, sealed with our seals and dated this 28" day of November, 1919.

Whereas, the above named Kansas Gas and Elec ric Company and The Public Utilities Commission of the State of Kansas have [prosecured] an appeal to the United States Circuit Court of Appeals, Eighth Circuit to reverse the judgmen' of the District Court for the District of Kansas, First Division, in the above entitled cause.

Now Therefore, the condition of this obligation is such that if the above named Kansas Gas and Elec ric Company and The Public Utilities Commission of the State o: Kansas shall prosecute their said appeal to effect, and answer all costs if they fail to make good their pleas, then this obligation shall be void; otherwise to remain in full force and effect.

KANSAS GAS AND ELECTRIC COMPANY,
By B. DOWNING, [SEAL.]
Attorney in fact.
AMERICAN SURETY COMPANY OF NEW YORK,
By A. T. ZIMMERMAN,
Resident Vice-President.

Attest:
[SEAL.] D. RAHE,
Res. Asst. Secy.

The above cost bond is on this 28th day of November 1919, hereby approved and ordered to be filed and made a part of the record.
JOHN C. POLLOCK, *Judge.*

Endorsed: Filed in the District Court on November 28, 1919.

(*Election as to Printing.*)

To the Clerk of the District Court of the United States for the District of Kansas, First Division:

Appellants, Public Utilities Commission of the State of Kansas and Kansas Gas and Electric Company, having appealed from the final decree entered in the above enti led cause on the 6th day of June, 1919, do hereby elect to take and file in the appellate
59 court, to be printed under the supervision of its clerk under its rules, a transcript of the record, or the part thereof requisite for the hearing of the case in that court.

F. S. JACKSON,
McCUNE, CALDWELL & DOWNING,
Solicitors for Appellants.

Endorsed: Filed in the District Court on December 4, 1919.

(*Præcipe for Transcript.*)

To the Clerk of the District Court of the United States for the District of Kansas, First Division:

In preparing the transcript of the record in the appeal of appellant from the final decree in the above entitled cause on the sixth day of June, 1919, please insert in such transcript the following:

1. The bill of complaint together with its Exhibit A, B, and C, attached thereto.

2. Petition of Kansas Gas and Electric Company for leave to intervene.

3. Order permitting Kansas Gas and Electric Company to intervene.

4. Intervening petition of Kansas Gas and Electric Company.

5. The temporary restraining order dated April 24, 1918.

6. The stipulation of the parties signed by their attorneys providing for the continuance of the restraining order and for the continued payment of the existing contract rates and covering the introduction of evidence at the final hearing.

7. Answer of defendant The Public Utilities Commission of the State of Kansas.

8. Motion of plaintiff for entry of a final judgment and decree in this cause upon the pleadings, bill, answer and stipulation of record.

9. Plaintiff's motion for judgment on the pleadings.

10. Final decree.

11. Petition for appeal.

12. Order allowing appeal.

60 13. Appeal Bond.

14. Assignment of errors.

15. Citation on appeal.

16. This præcipe.

F. S. JACKSON,
McCUNE, CALDWELL & DOWNING.
Solicitors for Appellants.

We hereby acknowledge due service of the attached præcipe, this 15th day of December, 1919.

T. F. DORAN,
KOS HARRIS,
HENRY I. GREEN,
Solicitors for Appellee, Wichita Railroad and Light Company.

Endorsed: Filed in the District Court on December 15, 1919.

(Clerk's Certificate to Transcript.)

UNITED STATES OF AMERICA,
District of Kansas, ss:

I, F. L. Campbell, Clerk of the District Court of the United States of America, for the District of Kansas, do hereby certify the foregoing to be true, full and correct copies of so much of the record and proceedings in Case No. 259-N, entitled The Wichita Railroad & Light Company, a corporation, Plaintiff vs. The Public Utilities Commission of the State of Kansas, Defendant, Kansas Gas and Electric Company, a corporation, Intervening Petitioner, in said Court as is called for by the Stipulation for Transcript of Record filed herein.

I further certify that the original citation is attached hereto and returned herewith.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Topeka, in said District of Kansas, this 15th day of December, 1919.

[Seal U. S. Dist. Court, Dist. of Kans., 1861.]

F. L. CAMPBELL,
Clerk.

Filed Dec. 17, 1919.
E. E. KOCH,
Clerk.

61 And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

(Appearance of Messrs. McCune, Caldwell & Downing as Counsel for Appellants.)

United States Circuit Court of Appeals, Eighth Circuit.

No. 5529.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS et al., Appellants,

vs.

THE WICHITA RAILROAD AND LIGHT COMPANY.

The Clerk will enter my appearance as Counsel for the Appellants.

H. L. McCUNE,
R. B. CALDWELL.
BLATCHFORD DOWNING.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Dec. 19, 1919.

(Appearance of Mr. Fred S. Jackson as Counsel for Appellants.)

The Clerk will enter my appearance as Counsel for the Appellants.

FRED S. JACKSON,
Topeka, Kansas.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Feb. 9, 1920.

62 *(Appearance of Mr. Lynn Webb as Counsel for Appellant Kansas Gas & Electric Company.)*

The Clerk will enter my appearance as Counsel for the Appellant, Kansas Gas & Electric Co.

LYNN WEBB,
731 Scarritt Bldg.,
Kansas City, Mo.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jan. 11, 1921.

(*Appearance of Messrs. Green & Palmer and Mr. William H. Lee as Counsel for Appellee.*)

The Clerk will enter my appearance as Counsel for the Appellee.

HENRY I. GREEN.
WM. G. PALMER.
THOS. F. DORAN.
WM. H. LEE.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Feb. 7, 1920.

(*Appearance of Mr. Kos Harris as Counsel for Appellee.*)

The Clerk will enter my appearance as Counsel for the Appellee.

KOS HARRIS.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Feb. 9, 1920.

63 (*Appearance of Mr. T. F. Doran as Counsel for Appellee.*)

The Clerk will enter my appearance as Counsel for the Appellee.

T. F. DORAN.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Feb. 13, 1920.

(*Order of Submission.*)

May Term, 1920.

Thursday, May 13, 1920.

This cause having this day been called for hearing, argument was commenced by Mr. H. L. McCune for appellants, continued by Mr. Thomas F. Doran and Mr. Henry I. Green for appellee and concluded by Mr. F. S. Jackson for appellants.

Thereupon, this cause was submitted to the Court on the transcript of record from said Dis*i*trct Court and the briefs of counsel filed herein.

64 United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1920.

No. 5529.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS et al., Appellants,

vs.

THE WICHITA RAILROAD & LIGHT COMPANY, Appellee.

Appeal from the District Court of the United States for the District of Kansas.

This action was instituted by the appellee against the Public Utilities Commission of the State of Kansas, to restrain the Commission from putting into effect an order, authorizing the Kansas Gas & Electric Company to add a surcharge to its rates for electricity furnished to consumers in the State of Kansas, classified according to the quantities consumed. A temporary restraining order was granted by the court. By leave of the court the appellant, Kansas Gas & Electric Company was permitted to intervene as a party defendant.

For convenience the parties will be referred to in this opinion, the appellee, as the Railroad & Light Co., the appellant Public Utilities Commission, as the Commission, and the appellant Kansas Gas & Electric Co., as the Gas & Electric Co.

Answers were filed and thereupon the Railroad & Light Co. filed a motion for a final decree upon the pleadings and exhibits. The exhibits filed with the complaint are: Exhibit A, is the order of the Commission sought to be enjoined; Exhibit B, is a copy of the contract entered into between the Gas & Electric Co. and the
65 Railroad & Light Co., on May 2, 1910, to continue until November 30, 1930; Exhibit C, is a copy of the application of the Gas & Electric Co. to the Commission for permission to add a surcharge to certain of its rates on electricity supplied to its patrons in the State of Kansas.

Upon a hearing the court held the order of the Commission complained of void and made the injunction perpetual.

The Railroad & Light Co. in its complaint charges that after having received notice from the commission of the filing of the petition and the date set for the hearing thereof, it appeared and objected to the Commission's jurisdiction. This was by the Commission overruled. The ground upon which it objected was that there was a contract between the Gas & Electric Co. and the plaintiff, which contract specifically fixed the rates and charges under which the Gas & Electric Co. was bound to furnish it electrical current from the date of the contract until November 30, 1930; but notwithstanding its objection the Commission on March 25, 1918, granted the application of the Gas & Electric Co., with some modifications.

Another ground upon which it attacks the order of the Commission is that it was without jurisdiction or authority to determine any question relative to the plaintiff's business, in that it conducts its business wholly within the City of Wichita and is not subject, under the law, to control or regulation by the Commission.

Another ground set up is that its contract with the Gas & Electric Co. was made and executed prior to the enactment of the law creating the Commission, that, therefore, the order of the Commission, violates the constitutional provision prohibiting a state from enacting any law impairing the obligation of contracts.

It is next claimed that the added charges by the order of the Commission are preferential and discriminatory against large consumers of electricity, and especially against the plaintiff, for the reason that the rates as fixed are upon a scale, increase as the volume of consumption increases, and thereby is in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

It is next claimed that the order fixes the rates unreasonably high and are confiscatory.

63 The order of the Commission recites that after hearing the evidence the Commission found that the Gas & Electric Co. should be authorized and permitted to add to its existing rates for electricity the following surcharge:

For the first 100 KWH per month, no surcharge.

For the next 14,900 KWH per month, one mill surcharge per KWH.

For the next 20,000 KWH per month, two mills surcharge per KWH.

For all excess over 30,000 KWH per month, three mills surcharge per KWH.

and thereupon made the order authorizing the company to add to its existing rates for electricity supplied all consumers using over 100 KWH per month the surcharge set out, until the further order of the Commission.

The contract between the Railroad & Light Co. and the Gas & Electric Co. was executed on May 2, 1910, and was to continue until November 30, 1930. It provided for the price the Railroad & Light Co. should pay for electrical capacity and energy furnished by the Gas & Electric Co.

There are many provisions, such as are usually inserted in contracts of this nature, which it is not necessary to state, as they are not material to the issues involved in this cause.

The application of the Gas & Electric Co. to the Commission for permission to add a surcharge to certain of its rates, states that the schedules of rates then in force, was filed with the Commission on May 4, 1914, that the rates were based upon the cost of producing and distributing electrical energy at that time, and yielded a reasonable return upon the value of its property used in producing and distributing electrical energy in the State; that since then the cost of producing and distributing such electrical energy has increased enormously on account of the increased cost of fuel and labor due to the

fact that the Nation is engaged in war. As a result of this increase
the cost of producing energy for the year 1917 was one hun-
67 dred per cent greater than the cost of production for the year
1914, all on account of such increase in the cost of the production and distribution; that its net income for the year ending December 31, 1917, was approximately $190,000.00 less than it would have been if it could have operated under the normal conditions existing in 1914, at the time its rates were first installed; that, if said rates are continued in effect, the result will be disastrous to your petitioner, depriving it of a reasonable return upon the value of its said property and making it impossible to find a market for the securities which it must issue in order to provide funds with which to make improvements, additions and betterments which are necessary to furnish proper and adequate service.

It further states that in December, 1916, being of the opinion that it would be able to reduce its rates for residential and commercial lighting, it filed a schedule of rates with the Commission, under which it proposed to put in effect a gradual reduction of such rates, such reduction extending over a term of ten years, and requested an order authorizing it to make such reductions; that the Commission has not yet acted on that petition. Still on January 1, 1917, it did reduce its rates for residential and commercial lighting in accordance with its proposed schedules; that the effect of such proposed reductions for the year 1918 will further reduce its net income in the sum of approximately $30,000.00, making a total loss of net earnings for the year 1918 of at least the sum of $220,000.00; that in order to meet this situation and to enable it to earn an amount sufficient to offset the loss from the conditions set out, it asks for authority to add to its existing rates the surcharge proposed. It is then stated that there are approximately 19,900 consumers served but that 17,000 consumers use a hundred KWH or less per month, and therefore would not be affected by the proposed schedule of surcharges. To proportion the surcharges equitably among the remainder of its consumers, fuel is approximately 75% of the cost of generating electricity, and, therefore, the surcharge, for the purpose of reimbursement should be so adjusted that the surcharge should increase in proportion to the amount of energy consumed. The percentage of increase fixed by such surcharge over existing rates is therefore increased in proportion to the amount of consumption.

The last step in the surcharge schedule offered, affects at the
68 present time six consumers, and the last two steps thirty-
eight consumers. The schedule proposed by the Electric & Gas Co. was for the first 100 KWH per month, no surcharge; for the next 1,000 KWH per month, twelve mills net per KWH; for the next 10,000 KWH per month, nine and five-tenths mills net per KWH; for the next 1,000,000 KWH per month, eight mills net per KWH, for all excess three and five-tenths mills net per KWH.

The intervening petition of he Gas & Electric Co. which is in the nature of an answer to the complaint and was treated as such, stated that the Public Utilities Commission of the Sta e, was created by an Act of the Legislature of the State of Kansas in the year 1911, and

is vested with full power, authority and jurisdiction to supervise and control public utilities doing business in the State of Kansas, and fix and regulate the rates to be charged by said utilities for service; it admits the execution of the contract and the order of the Commission set out in the complaint and exhibits, until the further order of the Commission; by reason of said order of the Commission, it claims it is lawfully authorized to make the surcharges fixed in the order of the Commission; that although the surcharge, so far as it affects the plaintiff, became effective on April 1, 1918, the plaintiff has failed to pay it and the amount due from it up to December 31, 1918, amounts to $9,088.18; that the temporary injunction granted by the court on April 23, 1918, prevented it from enforcing or attempting to enforce the order of the Commission of March 25, 1918; that the bond required of the plaintiff, when the temporary injunction was granted, was for the sum of $20,000.00; that the intervener has an interest in this action and is the party entitled to the benefits to be derived from the order of the Public Utilities Commission, therefore, it asks for the dissolution of the injunction and to recover from the plaintiff the amount due it from the plaintiff on account of the surcharge.

Upon these pleadings and exhibits a final decree was entered, making the injunction perpetual.

Mr. H. L. McCune and Mr. F. S. Jackson (Messrs. McCune, Caldwell and Downing were with them on the brief), for appellants.

69 Mr. T. F. Doran and Mr. Henry I. Green (Messrs. Green and Palmer, Messrs. Harris and Harris, Messrs. Ferry and Doran and Mr. William H. Lee were with them on the brief), for appellee.

Before Sanborn and Carland, Circuit Judges, and Trieber, District Judge.

TRIEBER, *District Judge,* after stating the facts as above, delivered the opinion of the Court.

The learned trial judge held, that although appellee had a contract with the Gas & Electric Co. made on May 2, 1910, to remain in force until November 30, 1930, the Commission could, under the police power of the State, to prevent injustice, and unreasonable and extortionate rates for service by the Gas & Electric Company, exercise the power to raise the rates, if necessary to prevent a loss, but that the facts disclosed by the record did not justify the making of the order to add a surcharge on the rates fixed by the contract with the plaintiff.

In behalf of the Railroad & Light Company it is claimed that the petition of the Gas & Electric Company did not state facts authorizing the Utilities Commission to take cognizance of the petition, as it failed to show that the contract rates are discriminatory and will result in injustice to the public, nor that without this surcharge the company would be unable to discharge its public duties, or that they

will be impaired; nor does it claim that insolvency would result unless permitted to add an additional surcharge to the contract price. It is further claimed that the petition failed to show any reason or justification for annulling the contract of the parties; that no facts are stated in the order of the Commission authorizing the exercise of its statutory power as prescribed in the Public Utilities statute; that there is no finding of the unreasonableness of the rates existing between the parties nor any discrimination between this contract and the rates charged other members of the public.

The Commission made no order against the Railroad & Light Company; there is nothing in the order referring to any contract in existence; all the order attempts to do and does, is to classify the customers of the Gas & Electric Co. and allow a surcharge on three of the four classes, in which they are divided.

That the Commission has, under the law creating it, authority to classify customers is not questioned, nor can it well be.

The failure of the Gas & Electric Co. to state in its petition that the rates then in force would cause it to become insolvent or would prevent it from discharging its duty to the public, did not deprive it of the right to ask for compensatory rates from the large consumers, if the rates charged these consumers are noncompensatory, even if, when added to the rates charged the smaller consumers the net income is sufficient to prevent the company from becoming insolvent, or enable it to discharge its duty to the public.

In Northern Pacific Ry. v. North Dakota, 236 U. S. 585, 594, 595, 597, the Supreme Court of North Dakota had held:

"In order to establish such a non-compensatory rate to be confiscatory (referring to rate on one article, lignite coal), it must further appear that any deficit under the rate affects the net intrastate freight earnings materially, and reduces them to a point where they are insufficient to amount to a reasonable rate of profit on the amount of the value of the railroad property within the state contributing to produce such net earnings."

This the Supreme Court of the United States, held to be erroneous. The court said:

"The State cannot estimate the cost of carrying coal by throwing the expense incident to the maintenance of the roadbed, and the general expenses, upon the carriage of wheat; or the cost of carrying wheat by throwing the burden of the upkeep of the property upon coal and other commodities. * * * The outlays that exclusively pertain to a given class of traffic must be assigned to that class, and the other expenses must be fairly apportioned."

The same principle was announced in Norfolk & Western Ry. v. Conley, 236 U. S. 605. In that case the act involved was a passenger rate on railroads. The Supreme Court of West Virginia had followed the rule adopted by the Supreme Court of North Dakota in the Northern Pacific R. R. case. The Supreme Court reversing the decree, held:

"The State may not select either of these departments
71 (freight or passenger) for arbitrary control. Thus, it would not be contended that the State might require passengers to be carried for nothing, or that it could justify such action by placing upon the shippers of goods the burden of excessive charges in order to supply an adequate return for the carrier's entire service."

In the instant case the Commission must have found the allegations in the Gas & Electric Companys' petition for the surcharge, that in the generation of electrical energy for large consumers fuel is approximately 75% of the cost of generation, and that the low rates given to these large consumers, in the schedule then in force, were noncompensatory by reason of the large increase in the cost of the coal used for the generation of electricity, and that for this reason there should be a surcharge sufficient to allow some profit on the investment, from the electricity furnished these large consumers.

That the effect of the order would be to nullify the contract, theretofore entered into by the parties does not make the order obnoxious to the constitutional provision, prohibiting states to enact laws, impairing the obligation of contracts, has been conclusively determined in Union Dry Goods Co. v. Georgia Public Service Corporation, 248 U. S. 372. The court in its opinion said:

"Except for the seriousness with which this claim has been asserted and is now pursued into this court, the law with respect to it would be regarded as so settled as not to merit further discussion.

"That private contract rights must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict, has been often decided by this Court." Citing a number of authorities.

The same conclusion was reached in Producers Transportation Co. v. Railroad Commission, 251 U. S. 228, where the court said:

"That some of the contracts before mentioned were entered into before the statute was adopted or the order made, is not material."

This disposes of the claim that the Commission was without authority to make the order, to affect the contract of the plaintiff because it was made before the Act creating the Public Utilities Commission was enacted.

72 In Kansas City Bolt & Nut Co. v. Kansas City Light & Power Co., 275 Mo. 29, 204 S. W. 1074, it was held:

Rates fixed by contract with a public service company for electricity to be supplied, are superceded by rates fixed by the Public Service Commision, since the police power of the State can not be abridged by contract. On writ of error from the Supreme Court, this judgment was affirmed by a per curiam opinion upon the authority of Union Dry Goods Co. v. Georgia Public Service Corporation, 251 U. S. * * *

It is next claimed that the Commission had no authority under the Act creating it, to make such an order, but that has been adversely decided by the Supreme Court of Kansas in State, ex rel., v. Kansas Postal Telegraph & Cable Co., 93 Kans. 298.

That the Commission, when making the order complained of, made no special findings of fact is wholly immaterial, as there is nothing in the Act creating the Commission and defining its duties and powers requiring it. As said in Detroit, etc., R. R. Co. v. Railroad Commission, 171 Mich. 335, 137 N. W. 329:

"It is unfortunate that the courts do not have the assistance which would be derived from a finding made by the Commission which would distinctly state the ultimate facts found and the factors, at least the controlling factors, considered in determining whether a rate was or was not reasonable."

Springfield Gas & Electric Co. v. Barker, 231 Fed. 331, 344, and Public Utilities Commission v. Springfield Gas Co., 291 Ill. 299, relied on by counsel for appellee are not applicable, as the statutes of Missouri and Illinois expressly provided that the Commission shall make and file its findings of fact in writing. In the Barker case the opinion quotes that section of the Missouri statutes. There is no such provision found in the Kansas statute.

The only act in writing required by the statute is found in Sec. 16 of the Act, which provides:

"All orders and decisions of the Public Utilities Commission whereby any rates * * * are altered, changed, modified, fixed or established, shall be reduced to writing, and a copy thereof, duly certified, shall be served on the public utility or common carrier affected thereby, by registered mail."

The fact that plaintiff's business is conducted wholly within the City of Wichita is immaterial. Pawhuska v. Pawhuska Oil Co., 250 U. S. 394.

73 It is also claimed that the act granting the Commission authority to make rates is unconstitutional, as being a delegation of legislative power. That it is not violative of any provision of the National Constitution was conclusively determined in Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, and followed by all the national courts ever since.

That it does not violate any provision of the Constitution of the State of Kansas was determined in State v. Johnson, 61 Kans. 803.

It is next contended that the order of the Commission does not state facts necessary to show that it had jurisdiction, and the rule that when a special tribunal, created with special powers to act, not in conformity with the rules governing actions at common law inter parties, the record must show all the facts necessary to establish jurisdiction is invoked. But the petition of the Gas & Electric Co. to the Commission, is as much a part of the record as the order, and it contains all the allegations necessary for the Commission to act in the matter. The petition is a part of the record. The allegations in the

petition determine the jurisdiction. Hartford Life Ins. Co. v. Johnson, decided June 28, 1920.

The Act creating the Commission, Sec. 20, expressly authorizes the Commission to act

"Whenever any common carrier or public utility governed by the provisions of this act shall desire to make any change in any rate, joint rate, toll, charge or classification or schedule of charges, or in any rule or regulation or practice pertaining to the service or rates of any such public utility or common carrier, such public utility or common carrier shall file with the Public Utilities Commission a schedule showing the charges desired to be made and put in force by such public utility or common carrier, etc."

Sec. 13 of the Act provides:

"It shall be the duty of the Commission, either upon complaint or upon its own initiative, to investigate all rates, etc. * * * and if after full hearing and investigation the commission shall find that such rates, etc. * * * are unjust, unreasonable, unjustly discriminatory or unduly preferential, the commission shall have power to fix and order substituted therefor such rate or rates, etc. * * * as shall be just and reasonable."

74 Section 18 of that Act makes the orders of the Commission prima facie reasonable. As the record fails to show what evidence was before the Commission when it made its order, and recites that evidence was introduced, there is nothing to enable the court to find that the order was unreasonable, or without substantial evidence. The presumption is that there was substantial evidence to warrant the findings made.

The claim that the order of the Commission is discriminatory against the plaintiff is clearly without merit. It applies to each party within the classes enumerated in the order. A rate which affects equally all in the same class, when the classifying is not arbitrary, can not be said to be discriminatory.

Counsel for appellee cite Kaul v. American Independent Telephone Co., 95 Kans. 1, 147 Pac. 1130, and Molohan v. Atchison, Topeka & Santa Fe Ry., 97 Kans. 51, in support of the contention that such an order as made by the Commission in the instant case, is discriminatory and, therefore, void. Neither of these cases sustains this contention. In the Kaul case the Telephone Company sought to raise its rates without any action of the Commission authorizing it, and it was held that the act did not automatically overflow contracts, but that the Commission must first act. In the Mollohan case it was held that the special privilege, to stop cattle in transit, is unlawful, until the schedules had been filed with and approved by the Commission, and the privilege is open to all shippers on equal terms. If it fails to grant the privilege to all shippers on equal terms it is discriminatory.

The court below erred in refusing to dissolve the temporary in-

junction and making it perpetual. The case is reversed and remanded with ins ructions to the trial court to dismiss the complaint.

Filed July 15, 1920.

SANBORN, *Circuit Judge,* dissenting:

On May 2, 1910, the Gas and Electric Company made a valid contract with the Railroad and Light Company to supply it with electric energy from that date until November 30, 1930, at rates
75 specified therein. On May 4, 1914, the Gas & Electric Company filed its schedule of these rates with the Commission and they took effect pursuant to the Act of the Legislature of Kansas of May 22, 1911, creating the Public Utilities Commission of that state, General Statutes Kansas 1915, Chap. 97, and became the lawful established and reasonable rates for this service. On January 22, 1918, the Gas & Electric Company filed a petition with the Commission upon which it has made an order raising these rates.

Under the police power of the Sta e and the Statutes of Kansas the Commission has the jurisdiction and the authority to raise the rates for the service of public utility corporations prescribed by lawful contracts be ween it and others in cases where the agreed rates are confiscatory, unduly discriminatory, and in cases where the good order, health, comfort or public welfare requires such action, but in my opinion the jurisdiction of the Commission in this direction extends no further. For example, it does not ex'end to the changing of contract rates of public utilities with private parties not demanded by the pub lic welfare because one of the parties to one of these contracts was induced to agree to it by mistake or by accident or by the fraud or the deceit of the other party to it. It is no ground, either at law or in equity, either in the courts or elsewhere, for the modification or abrogation of a con ract for electric energy or for other public utilities for a long term of years, that the contract turns out to be more profitable during some of the years of the term or more burdensome during o her years of the term to one or the other of the parties than that party anticipated at the time it signed the agreement that it would be. Marble Company v. Ripley, 77 Wall. 339, 355, 356, 357; Texas Co. v. Central Fuel Oil Co., 194 Fed. 1, 21, 114, C. C. A. 21, 41.

When carefully analyzed and reduced to its lowest term the only ground for the raising of the contract rates stated in the petition of the Gas & Electric Company and the only basis for the order of the Commission raising them upon that petition is, in my opinion, that the contract rates which the peition shows were so much more profitable during the first years of the term of the contract than it anticipated, that in December, 1916, the Gas & Electric Company filed with the Commission and asked approval of a schedule of
76 reduced rates, became in 1917 so much less profitable that it filed its petition for this raise. The petition does not show what profits the Gas & Electric Co. derived from the contract rates during the years prior to 1917. It does not show that the contract

rates have been or will be confiscatory. It does not show that the welfare of the public demands the increase, and in my opinion it states no facts or case within the jurisdiction of the Commission, its order was made without jurisdic ion and it is void. For these reasons I am unable to concur in the opinion and the disposition of this case.

Filed July 15, 1920.
A true copy.

Attest:

Clerk U. S. Court of
Appeals, Eighth Circuit.

77 (*Decree, July* 15, 1920.)

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1920.

No. 5529.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS and KANSAS GAS AND ELECTRIC COMPANY, Appellants,

vs.

THE WICHITA RAILROAD AND LIGHT COMPANY.

Appeal from the District Court of the United States for the District of Kansas.

Thursday, July 15, 1920.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Kansas, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Cour', in this cause, be, and the same is hereby, reversed with costs; and that The Public Utilities Commission of the State of Kansas, and Kansas Gas and Electric Company have and recover against The Wichita Railroad and Light Company the sum of — Dollars for their costs in this behalf expended and have execution therefor.

It is further ordered that this cause be, and the same is hereby, remanded to the said District Court with directions to proceed in conformity with the views expressed in the opinion of this Court.

July 15, 1920.

Vacated and set aside by order entered January 17, 1921.

78 In the United States Circuit Court of Appeals, Eighth Circuit.

No. 5529.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS et al., Appellants,

vs.

THE WICHITA RAILROAD & LIGHT COMPANY, Appellee.

Petition for Rehearing.

It is so apparent from a careful study of the majority opinion of this court in this case that your Honors have entirely misapprehended or overlooked controlling issues arising upon the record, that we feel it our duty to present this petition for rehearing.

Neither in the statement of the case, nor in the opinion of the court, does it appear that the decree of the District Court was entered upon our motion for judgment on the pleadings.

79 The majority opinion proceeds on the theory that the case was tried on its merits in the District Court as if it were a suit brought into that court upon a short record in the nature of an appeal or writ of error.

It is also unfortunate that we apparently did not sufficiently inform this court concerning our contentions with reference to the disastrous result that would follow a failure to hold invalid a commission order of the form and character of that involved in this case.

It appears in the opinion that we have been understood as urging that the Kansas Public Utilities Act is unconstitutional. We did not intend to be so understood.

However, we do assert that if an order of the kind and in the form of that made by the commission in this case is declared by the Kansas Statute to be prima facie reasonable, then the Statute is unconstitutional because the order in question simply states an opinion that certain rates ought to be established, and then proceeds to establish the rates.

The fixing of rates for public service companies is purely legislative. A Commission cannot be created by Statute for the purpose of fixing public utility rates. A public utility act to be constitutional in the State of Kansas, must create an administrative and ministerial body, because the Legislature cannot delegate its legislative powers to a Commission.

We have cited numerous authorities in appellee's brief to support this principle which is now universally accepted by all the states having a utilities commission. The function of a utilities commission is to find facts. It is not a court and cannot be made a court by statute under the Kansas Constitution.

80 Yet the majority opinion overlooks and misapprehends that the result which would follow if the opinion be sound, would be to clothe the Kansas Public Utilities Commission with more power than is possessed by courts of inferior jurisdiction created pursuant to the provisions of the Kansas State Constitution.

We therefore in appellee's brief, presented authorities to show that the order attacked could not be treated as if it were the judgment of a court. And evidently your Honors overlooked our argument that if it were the purpose and intention of the Kansas Public Utilities Act to clothe the Commission with power to enter orders and make decisions prima facie reasonable as court orders, then the Statute would be unconstitutional.

The court has misapprehended that our contention is that upon the face of the record, it clearly appears the Kansas Public Utilities Commission has in this case undertaken to exercise

(*a*) Delegated legislative powers which could not be legally conferred under the Kansas Constitution; or

(*b*) Judicial powers as a court of special jurisdiction which could not be constitutionally exercised by it.

The majority opinion fails to distinguish between the abrogation of a rate fixed by law and a rate fixed by contract between the parties. These two are as different as day and night, and authorities in support of the former have absolutely no application to a case of the latter class.

Long service in the federal courts may furnish the reason for a learned jurist overlooking the fact that there is a vast difference between the presumptions indulged to support a decree of the
81 federal court, and those which obtain in the state courts. In the Federal Court, if the case is one of a class over which the Federal Court has jurisdiction, then all presumptions are indulged necessary to sustain the ultimate judgment or decree. In the state courts the same rule obtains only when a decree or judgment is involved which was rendered by a court of general jurisdiction, and even then the books are full of cases where a court of general jurisdiction must first make findings and enter its judgment or decree on such findings. But findings mean more than a mere opinion that a certain judgment ought to be entered. It is not enough for the court to say that, "It finds Smith should have a judgment for $10 against Jones". But Smith must positively disclose in his pleadings that Jones owes him $10, and the court must find this issue for the plaintiff before it can enter a judgment, and then it must enter its judgment "upon its findings".

But the rule of presumptions is entirely different when applied to the order of any inferior or statutory, or so-called quasi-judicial tribunal. As to such tribunals, no presumptions are indulged to support their orders, but their complete, adequate and appropriate jurisdiction over the particular case, as well as over the class of proceedings of which the particular case is one, must clearly appear and be actually found and determined to exist by positive findings in the order of the tribunal claiming the jurisdiction.

The majority opinion presumes this is a collateral attack upon the order of the Commission. This is a misapprehension. This is not a collateral at ack, it is a direct attack upon an order
82 of the Commission by one of the parties of record to the proceedings in question, and is made in the specific manner directed by the Kansas Statute and in the only way the Kansas law permits a review of the Commission's record in the case involved.

We do not believe that your Honors intend to lay down a rule in this case that will result in trials de novo upon every court review of the record and proceedings had before a public utilities commission. Yet that is exactly the result which will follow if the motion for judgment upon the face of the pleadings in this case be denied. And this is wholly independent of the important principle involved and argued that the rules and presumptions obtaining where rates are fixed or regula ed by law, do not apply where a regulating body not clothed with legislative power, undertakes to enter an order abrogating valid contracts entered into years before the Commission is created and by the specific provisions of the contract ex ending long terms into the future.

The effect of the majority opinion is to lay down the rule that where a commission order is directly at acked in the specific manner provided by Statute, the court in which the suit is brought will try every such case de novo upon the evidence presented before the Commission.

Such a rule would treat the Commission as a court and under the majority opinion, would give the Commission the benefit of all
the presumptions indulged to sustain the judgment of courts
83 of general jurisdiction without even requiring as solemn findings of fact as is required of such cour s.

We therefore respectfully invite a careful consideration by this court of this petition for rehearing, and in support hereof, respectfully show:

That this Honorable Court through oversight or misunderstanding of the record in this case and the law applicable thereto has fallen into grievous error in its decision and opinion herein in that:

I.

The written contract between appellee and the Kansas Gas & Electric Company, dated May 2nd, 1910, continuing un il November 30th, 1930, is erroneously treated by the court as subject to change by order of the Public Utilities Commission on request of one of the parties thereto upon the sole ground that the rates fixed thereby due to extraordinary conditions ("due to the fact that the nation is engaged in war") are unremunerative.

Columbus Railway, Power & Light Co. vs. City of Columbus, Ohio, et al., 249 U. S. 399.

At page 410 of the opinion in the case cited the Supreme Court mirrored the si uation in the case at bar when it said:

"This case does not involve the remedies which may be invoked against a street railway company which is or may become insolvent because of conditions arising since it entered into a given contract. The company seeks now by its own act to terminate the contracts, still binding upon it, by their terms, as to rates of fare to be
84 charged, and seeks to have the aid of a court of equity (in the case at bar the aid of the Public Utilities Commission) by enjoining the city from any further requirement of service under them."

In the Columbus case the Supreme Court said:

"There is no showing that the contracts have become impossible of performance."

In the case at bar there was not only no showing that the contract had become impossible of performance, but there is no allegation or claim to that effect.

At page 412 of the opinion in the Columbus case the Supreme Court says, that the contract must be interpreted in view of the situation of the parties at the time when the contract was made and in view of the nature of the undertaking under consideration, and then says:

"It certainly was not intended to question the principle, frequently declared in decisions of this court, that if a party charge himself with an obligation possible to be performed, he must abide by it unless performance is rendered impossible by the act of God, the law, or the other party. Unforseen difficulties will not excuse performance. Where the parties have made no provision for a dispensation, the terms of the contract must prevail." (Citing cases.)

The Supreme Court then quotes from Day vs. United States, 245 U. S. 159, as follows:

"One who makes a contract never can be absolutely certain that he will be able to perform it when the time comes, and the
85 very essence of it is that he takes the risk within the limits of his undertaking."

At page 414 of the opinion in the Columbus case the Supreme Court says:

"That there might be a rise in the cost of labor, and that the contract might at some part of the period covered become unprofitable by reason of strikes or the necessity for higher wages might reasonably have been within their comtemplation when the contract was made and provisions made accordingly. There is no showing in the bill that the war or the award of the War Labor Board necessarily prevented the performance of the contract. Indeed, as we have said, there is no showing, as in the nature of things there cannot be, that the performance of the contract, taking all the years of the term together, will prove unremunerative. We are unable to find here

the intervention of that superior force which ends the obligation of a valid contract by preventing i s performance."

II.

This court, we respectfully submit, is in error in stating that:

"The failure of the Gas & Electric Company to state in its petition that the rates then in force would cause it to become insolvent, would prevent it from discharging its public duty, did not deprive it of the right to ask for compensatory rates from the large consumers, if the rates charged these consumers were noncompensatory, even if when added to the ra es charged the small consumers the net in-
86 come is sufficient to prevent the company from becoming insolvent or enable it to discharge its public duty."

It is admitted, and this court has found, as shown by the above quota ion from its opinion, that in the case at bar there is neither allegation nor claim in the application of the Kansas Gas & Electric Company to the Public Utilities Commission that the contract with appellee is impossible of performance because of the increased cost due to war, nor is or was there any proof or finding of the Commission that such was the fact, nor is there any claim, proof or finding that the rates fixed by the contract compel the exaction of unreasonably high rates from other consumers or from the public, to prevent disaster to the Kansas Gas & Electric Company, or that such rates were discriminatory or destroyed its power to perform its public duties. All that was claimed was that it needed more money. This, we submit, is not a sufficient reason for the abrogation of a valid contract.

We wish to suggest, relative to Specifications I and II above, that there is a clear distinc ion between a contract for rates which affect only the income of the stockholder of the corporation rendering the service, and a contract which on the other hand infringes the public welfare, the public health, the public morals, or the public safety. The police powers of the state can modify and abrogate the latter contract under proper procedure, but it can never modify or abrogate the contract which affects only the income of the company rendering the service, on the sole ground that the rates which it has
87 agreed to therein are unremunerative. Such a contract can not be abrogated by the state or any of its agencies unless such rates themselves so impoverish the utility as to render it impossible to perform its obligation to the public, or unless they compel the exaction of unreasonably high rates from other consumers, and before relief can be afforded in the latter cases, the facts must not only be peladed and proved but must be found by the tribunal awarding the relief, as will be hereafter more clearly shown.

It is distinctly held in Columbus Railway & Power Company vs. Columbus, 249 U. S. 399, at page 412, and has been frequently declared by the decisions of that court, that:

"If a party charge himself with an obligation possible to be performed he must abide by it unless performance is rendered impossible by the Act of God, the law or the other party."

In the case of Raymond Lumber Company vs. Raymond Light & Water Company, 92 Wash, 330, L. R. A. 1917 C., 574, it was held that the contract rates there in question could be abrogated and set aside by the state commission because of the unjust discrimination, which imposed an undue burden upon the public, but in that case the Supreme Court of Washington in dis-inguishing the facts of that case from other decided cases, held that:

"The case of Sultan R. & Timber Co. vs. Great Northern R. Co., 58 Wash. 604, 109 Pac. 320, 1020, is dis inguishable. There a contract for the shipment of logs had been made prior to the taking effect of the Railroad Commission Law. The law, by its
88 terms, did not make the contract void. There was no finding there by the commission, or by the court, that the rate fixed in the contract was in any manner discriminatory. The commission did not direct its termination. Here the commission found that the contract resulted in discriminatory rates and directed its cancellation. In the one case the contract resulted in a discrimination of rates; in the other it did not, and therein lies the distinction."

The court will note from the above quotation that:

"The (Washington Commission) law by its terms did not make the contract void."

This is true of the Kansas Commission Law, as was specifically held by the Supreme Court of Kansas in Kaul, et al., vs. The American Independent Telephone Co., 95 Kans. 1, opinion p. 4:

"The passage of the (Commission) act did not automatically overthrow contracts, nor set aside schedules of rates which had been agreed upon. Neither did the fact that the defendant published and filed a schedule of rates with the public utilities commission abrogate the contract."

The Kansas Supreme Court then proceeds to specifically uphold the contention we make, namely; that before the Kansas Commission can in any way change contract rates it must first find that such contract rates are unreasonable. It uses this specific language:

"In any event, rates previously agreed upon between utilities and patrons will continue in force until the commission has found them to be unreasonable, or has prescribed other rates."

89 The necessity for the Commission to make findings as a jurisdictional prerequisite to making any order changing an existing rate will be more fully presented under Specification V hereof. We here, however, respectfully show that this Honorable Court has wholly misunderstood, misconstrued and misapplied our citation

of the Kaul case, cited above. We did not cite that case, as is stated at page 11 of this court's opinion, "in support of the contention that such an order as made by the Commission in this case is discriminatory and therefore void." The only reference to this case in appellee's brief is found at pages 10 and 11 thereof, in quotations from the opinion of Judge Pollock. At page 10 of appellee's brief, where reference is made to the Kaul case, it is in a quotation from Judge Pollock's opinion, in which he says:

"The enactment of the public utilities law in no manner or way impaired the validity of the contract existing between the parties, or affected the rates for service therein stipulated. Kaul vs. Telephone Co., 95 Kan. page 1."

On page 11 of appellee's brief, the Kaul case is again referred to in quotation from Judge Pollock's opinion. There, Judge Pollock says:

"As to the second ground of invalidity of the order, the Supreme Court of this State in commenting on the Present Public Utilities Act, its operation and effect, in Kaul vs. Telephone Co., supra, opinion by Chief Justice Johnson, said, etc."

After which follows quotation from the Kaul case showing that in that case "it is not shown nor claimed that it (the Commis-
90 sion) has found the contracts to be unreasonable, etc. The passage of the act did not automatically overthrow contracts, etc."

We are unable to find any place in appellee's brief where we cited the Kaul case "in support of the contention that such an order as made by the Commission in the instant case is discriminatory and therefore void." Neither do we find, on careful examination, that we anywhere in our brief cited the case of Mollohan vs. A. T. & S. F. R. Co., 97 Kan. 51, in support of any proposition. We certainly did not intend to cite it in support of the principle as suggested by the court, and we respectfully ask the court to recheck its notes on these citations.

The Kaul case does, however, sustain appellee's contention that the passage of the commission act does not automatically abrogate contract rates, and that existing contract rates cannot be abrogated by order of the Commission unless and until the Commission has found that such existing contract rates are unreasonable, as we have heretofore shown, and as shown in the opinion of Judge Pollock quoted from at page 11 of appellee's brief.

It is held by many commissions and courts (see In re Rockingham Light & Power Co., P. U. R. 1917 F., 24) that "if furnishing the service under the contract simply means a reduction of dividends, the stockholders must stand the loss."

See Alford vs. Dennis, 102 Kans. 403, in which it is held that:

"Equity will not cancel a contract which is merely a bad or improvident bargain."

91 Commissions are bound by this rule unless the rights of the public are involved.

See, also, U. S. vs. Gleason, 175 U. S. 588, in which the Supreme Court of the United States said in its opinion, page 602:

"While we are to determine the legal import of these provisions according to their own terms, it may be well to briefly recall certain well-settled rules in this branch of the law. One is that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless his performance is rendered impossible by the act of God, the law, or the other party. Difficulties, even if unforeseen, and however great, will not excuse him. If parties have made no provision for a dispensation, the rule of law gives none—nor, in such circumstances, can equity interpose."

See, also, Columbus Street Railway Co. vs. Columbus, 249 U. S. 399, and Carnegie Steel Co. vs. U. S., 240 U. S. 156.

III.

We further submit that the court is in error in applying the principles of law announced in Northern Pacific Rly. Co. v. U. S. 236 U. S. 585, to the facts in the case at bar.

We respectfully show that this is true because, as above shown, a party to a contract can never obtain relief therefrom solely because the rates fixed by that contract are noncompensatory. Further citations of authorities to sustain this principle of law are unnecessary; it is elementary. The rule is, however, different when the

92 rate is not fixed by the contract but is fixed by the state or any of its agencies through its regulatory or police powers. An individual or corporation can by his or its own contract forego a compensatory rate, provided such contract does not infringe the public's rights, but a state can never impose upon such person or corporation a noncompensatory rate for its entire business or any part thereof for any period of time. This is all that is held in Northern Pacific Railway Company vs. North Dakota cited by the court. In that case the noncompensatory rate was fixed by the state for one commodity, under the guise of public welfare, which, of course, was held to be unlawful.

The same is true of the rate considered in Norfolk & Western Railway Company vs. Colony, 236 U. S. 605, and the Supreme Court of the United States simply held in both these cases that the state could not impose upon one class of traffic the burden of carrying another. There the question was not whether a self-imposed contract which failed to yield a remunerative return could on that account alone be abrogated, but the question was whether the state through its legislature and other agencies could at any time deprive the utility or carrier of a compensatory return on any part of its business. There were no contractual relations involved in those cases, and it follows that the cases cited by this Honorable Court, above referred to, are not authority to sustain this court's opinion.

We have, we believe, conclusively shown above that before a rate

contract can be abrogated it must be pleaded, shown and
93 found that the rates fixed thereby are not only noncompensatory but are of such a character that they will make the performance of the contract impossible, or that they will deleteriously affect the public, or in some manner conflict with the police powers of the state, and this must be done in every case independent of statutory requirement, as will be hereafter shown.

As was said in Union Dry Goods Company vs. Georgia Public Service Corporation, 248 U. S. 372, cited by this court, private contract rates where the public's rights are deleteriously affected thereby must "yield to the public welfare"; but as was said in that case, this occurs only "where the latter (the public's right) is appropriately declared and defined and the two conflict," which did not occur in the case at bar.

In that case, the Supreme Court cited the case of Manigault vs. Springs, 199 U. S. 473, and quoted therefrom as follows:

"It is settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered between individuals may thereby be affected."

With these principles of law as announced by the Supreme Court of the United States we have no controversy, they are wise and just, but we respectfully urge that the principles of law thus announced have no application to the record in the case at bar. In other
94 words, a party to a solemn written contract can never be relieved from its obligations solely for his own profit, as will be done in this case if the opinion and decision of this court is allowed to stand.

It is inconceivable that a party to a rate contract can be relieved from its obligations solely because the rates therein fixed prove to be temporarily unremunerative. In the case at bar, the contract rates and other rates of the Kansas Gas and Electric Company were so remunerative that it, in December, 1913, voluntarily filed a schedule of reduced rates to general consumers. It did not, however, at that time see fit to voluntarily reduce appellee's contract rates, and no one would contend that the Commission by an order could relieve the appellee from its contract rates because they were for the time being excessively high, considering costs; and what could not be done for appellee cannot be done for the Kansas Gas and Electric Company. And neither party could or can be relieved from its contract obligations unless the rights of the public are involved, and then only when "those rights are appropriately declared and defined." Otherwise, contracts would, indeed, be "scraps of paper," to be ignored at the mere whim and caprice of the Imperial Public Utilities Commission.

Analysis of the case of Union Dry Goods Company vs. Georgia Public Service Corporation, 248 U. S. 372, relied upon by appellants and quoted by this Honorable court as sustaining its opinion.

We respectfully submit and show that the above entitled case in its facts, and the principles of law applied thereto by the Su-
95 preme Court of the United Sta es, sustains every contention of appellee herein.

We have never contended that a contract made prior to the passage of the Public Utilities Act of Kansas could not be changed by the Public Utilities Commission in a proper case upon proper procedure and proper findings by the Commission, where he contract rates fixed thereby were discriminatory or cast an undue burden upon other consumers, or so impoverished a corporation furnishing a public service that the performance of the contract was thereby rendered impossible. We have always conceded and now concede that under such circumstances the Public Utilities Commission has full power to modify and abrogate such a written contract. This is all that is held in the Union Dry Goods Company case, and an examination of the record reveals the fact that the Public Utilities Commission specifically found (Tr. of Rec. of Sup. Ct. of U. S., page 40, submitted herewith), in the language following, that:

"All special rates, whether in the form of contracts for definite periods, or informal, in excess of these prescribed rates are illegal. The rates prescribed are maximum rates and cannot be exceeded.

"Should the Railway and Light Company have outstanding contracts, verbal or written, which are at less than the rates prescribed they must be abrogated, as unlawfully discriminatory, and made to correspond with the Commission's scale, or the same special rates given to all of the public.

"The Commission has given careful consideration to the contentions of counsel for firms and individuals holding term con-
96 tracts made at the rates now in effect, that they should stand and be carried out by the company. To allow them to stand and to require others of the public to pay higher rates would be rank discrimination; such a condition cannot be allowed to exist. One of the chief objections (objects) of the creation of this Commission, was that it should at all times prevent unlawful discriminations, and compel equality of service and charges to all under like circumstances and conditions."

In that case, as was said in the opinion therein, by the Supreme Court of the United States, the rights of the public were not only "appropriately declared and defined" but the contract rates were, as the Georgia Commission and Supreme Court said, in conflict therewith, because, as the Georgia Commission found, the contract rates were not only unlawfully discriminatory but were of such a character that "to allow them to stand and require others of the public to pay higher rates would be rank discrimination; such a condition cannot be allowed to exist."

Counsel for appellants in the case at bar frankly concede that no question of discrimination was involved in the hearing before the Commission. They say in their brief at page 35:

"The trial court gave as one reason for the invalidity of the order of the Commission as applied to appellee, the failure of the Commis-

sion to find that there was any discrimination between the rate fixed in the contract and other rates charged other members of the public. We submit that no such finding was necessary for the reason that the order was not based upon any such discrimination. An examination of the order and of the facts stated in the pleadings show that the order was not made to remove a discrimination existing between appellee and other consumers but was made to increase the rate of large consumers of electricity, including appellee, who happened to be in the class affected by the surcharge order."

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In other words counsel for appellants admit that the questions before the Commission were not within the police powers of the state but that appellee's contract was arbitrarily abrogated and the rates therein fixed increased because appellant needed more money. This we assert is an insufficient reason for the abrogation of a written contract.

98

IV.

The Court erred in holding that such written contract may be modified and abrogated by order of the Commission classifying the customers of the Kansas Gas & Electric Company without allegation or complaint in the application of that Company to the Commission that the rates fixed by the contract are discriminatory or so unreasonably low that the Kansas Gas & Electric Company is compelled to exact unreasonably high rates from other consumers to make up the losses sustained by reason of the contract rates in question, and without any allegation by the complainant or finding by the Commission that the rates fixed by the contract affect the public health, morals or safety or are in any wise in conflict with the police powers of the state or the general welfare.

The Commission cannot do indirectly that which it cannot do directly. It has been shown in specification 1 above that the contract cannot be abrogated for the benefit of one of the parties by direct action of the Commission without allegation, proof and findings that the public welfare is deleteriously affected thereby. It follows that since the contract cannot be abrogated by direct act, it cannot be abrogated by an indirect act, namely, by classification of customers without allegation, proof and findings that the public welfare demands such action, and what has been said under Specifications I, II and III applies with equal force to this Specification No. IV.

99

V.

The Court erred in holding—

"That the Commission when making the order complained of made no special findings of fact is wholly immaterial, as there is nothing in the Act creating the Commission and defining its duties and powers requiring it."

It is apparent that the court in reaching this conclusion overlooked the fact that an application was filed with the Commission by the Kansas Gas & Electric Company for increased rates or an added surcharge to existing rates; that notice was served upon the interested parties and that a hearing was had by the Commission; that evidence was presented to the Commission, briefs filed and arguments had. The Commission was fully advised as to the contentions of the parties, and the claims made in this suit by the appellee herein were fully presented to the Commission. Considering these facts it is plain that this Honorable Court overlooked the mandatory provisions of Sections 13 and 16 of the Kansas Public U ilities Act. Section 13 is found in full in appellant's brief at page 15, and section 16 is found in full in appellant's brief at pages 18 and 19. Extracts from Section 13 are found in app-llee's brief at pages 18 and 19, and extracts from Section 16 are found at page 19 of appellee's brief. Section 13 in full is as follows:

"Section 13. It shall be the duty of the commission, either upon complaint or upon its own initiative, to investigate all rates,
100 joint rates, fares, tolls, charges and exactions, classifications or schedules of rates, or joint rates and rules and regulations, and if after full hearing and investigation the commission shall find that such rates, fares, tolls, charges or exactions, classifications or schedules of rates or joint rates, or rules and regulations, are unjust, unreasonable, unjustly discriminatory or unduly preferential, the commission shall have power to fix and order substituted therefor such rate or rates, fares, tolls, charges, exactions, classifications or schedules of rates or joint rates and such rules and regulations as shall be just and reasonable. If upon any investigation it shall be found that any regulation, measurement, practice, act or service complained of is unjust, unreasonable, inefficient, insufficient, unduly preferential, unjustly discriminatory, or otherwise in violation of any of the provisions of this act or of the orders of this commission, or if it be found that any service is inadequate or that any reasonable service cannot be obtained, the commission shall have power to substitute therefor such other regulations, measurements, practices, service or acts, and to make such order respecting any such charges in such regulations, measurements, practices, service or acts as shall be just and reasonable. Whenever, in the judgment of the Public Utilities Commission, public necessity or convenience require, the commission shall have power to establish just and reasonable concentration, commodity, transit or other special rates, charges or privileges, but all such rates, charges and privileges shall be open to all users of a like kind of service under similar circumstances and conditions."

Section 16 in full is as follows:

"Section 16. If upon such hearing and investigation the rates,
joint rates, fares, tolls, charges, rules, regulations, classifica-
101 tions or schedules of such common carrier or public utility governed by the provisions of this act, are found to be unjust, unreasonable, unfair, unjustly discriminatory, or unduly pref-

erential, or in any wise in violation of the provisions of this act, or of any of the laws of the State of Kansas, the Public Utilities Commission shall have the power to fix and establish, and to order substituted therefor, such rates, joint rates, fares, tolls, charges, rules, regulations, classifications or schedules as it shall find, determine or decree to be just, reasonable and necessary; and if it shall be found that any regulation, practice or act whatever, relating to any service performed or to be performed by such public utility or common carrier for the public in any respect unreasonable, unjust, unfair, unreasonably inefficient, insufficient, unjustly discriminatory or unduly preferential, or otherwise in violation of any of the provisions of this act, or of any of the laws of the State of Kansas, the Public Utilities Commission shall have full power, authority and jurisdiction to substitute therefor such other regulations, practice, service or act as they find and determine to be just, reasonable and necessary. All orders and decisions of the Public Utilities Commission whereby any rates, joint rates, fares, tolls, charges, rules, regulations, classifications, schedules, practices or acts relating to any service performed or to be performed by such public utility or common carrier for the public are altered, changed, modified, fixed or established, shall be reduced to writing and a copy thereof, duly certified, shall be served on the public utility or common carrier affected thereby, by registered mail; and such order and decision shall become operative and effective within thirty days after such service, and such public utility or common carrier shall, unless an action is commenced in a court of proper jurisdiction to set aside the findings, orders and decisions of said Public Utilities Commission, or to revise and correct the same, carry the provisions of said order into effect."

102 We respectfully submit that under the provisions of the statute above quoted, the Commission must, after full hearing and investigation, find that such rates (those under investigation) * * * are unjust, unreasonable, unjustly discriminatory, or unduly preferential, before the Commission has any jurisdiction whatever to enter an order changing such rates, for said section contains this positive provision:

"If upon any investigation it shall be found that any regulation, etc., is unjust, unreasonable, etc., or otherwise in violation of the provisions of this act or of the orders of the Commission * * * the Commission shall have power to substitute therefor such other regulations, etc. * * * as shall be just and reasonable."

By this section of the statute findings are affirmatively made a necessary jurisdictional prerequisite. Without such findings the Commission is without jurisdiction to substitute for the rates in question rates which it may deem just and reasonable.

Again, section 16 provides that:

"If upon such hearing or investigation the rates, etc., * * * are found to be unjust, unreasonable, unfair, unjustly discriminatory

or unduly preferential, or in anywise in violation of the provisions of this act or of any of the laws of the state of Kansas, the public utilities commission shall have power to fix and establish and to order substituted therefor, such rates joint rates, fares, tolls, charges, etc., * * * as it shall find, determine and decree to be just, reasonable and necessary."

By this provision it is mandatory that before the Commis-
103 sion shall substitute new rates for existing rates, the Commission must find the rates under inquiry to be unjust, unreasonable, discrimina'ory, etc. Otherwise by the plain provisions of this section the court is without jurisdiction to modify existing rates, or to substitute other rates therefor.

Again, section 16 further provides:

"If it shall be found that any regulation, or prac'ice, etc. * * * is unjust, unfair, etc., * * * the Commission may then substitute therefor other regulations which are just, reasonable, etc.

Without such findings, even regulations cannot be changed or new ones subs ituted therefor.

This section further provides that:

"All orders and decisions of the public utilities commission, whereby rates, etc., * * * are altered, changed or mo'ified, shall be reduced to writing and a copy thereof duly certified shall be served on the public utility or common carrier affected thereby."

It seems to us clear that the legislature intended to make findings by the Commission a mandatory jurisdictional prerequisite. Without findings that existing rates are unjust, unreasonable, etc., the Commission is wholly without jurisdiction to modify them, or to substitute new rates therefor; and it is clear, also, that the legislature intended that such findings, which we believe are included within the word "decisions," used in section 16, "shall be reduced to writing and a copy thereof served upon the utility affected thereby."

104 The legislative intent, as we construe it here, is supported by the provision of the old Railroad Commission Act which is still in force, and the duty of enforcing which is vested in and imposed upon the Public Utilities Commission. This provision is found in general section 8417 of the Gen. Stats. of Kans. 1915. It recites that:

"In all cases where complaints shall be made in accordance with the provisions of section 18 of this act that an unreasonable charge is made, or that the rates charged for freight are unjust, unreasonable, etc., and the Board shall find such complaint to be true, they shall require a modified charge of the service rendered, etc., and shall certify their findings to the officer of the road against which the complaint is made."

The railroad commission had no jurisdiction of public utilities other than common carriers or railroads, and the law here quoted

from did not apply to such other utilities, but the mandatory provision relative to the service of findings made by the commission is carried forward into section 16 of the public utilities act quoted above, and, as has been shown, it is therein recited that the decisions of the public utilities commission, which we are convinced, include findings, shall be reduced to writing and copy thereof duly certified shall be served on the public utility or common carrier affected thereby. This intent and purpose is consonant and in harmony with justice, common sense and reason, and is found, in some of the statutes of other states, and is universally held by the courts to be necessary even in the absence of mandatory statutes requiring such findings.

105 If the law were otherwise, the public utilities commission of Kansas would have absolute power to assume jurisdiction over all rates and to change them at the commission's whim or caprice, without showing any justification whatever for the assumption of arbitrary power.

This cannot be the law as it would not only be the open door to injustice, but would afford immunity for corruption and fraud. We, therefore, insist that this Honorable Court is in error in holding that the fact that the Commission made no special findings is wholly immaterial, and in holding that there is nothing in the commission act requiring such findings.

We further respectfully submit that the great weight of authority in this country is to the effect that even without statuory provisions requiring Boards and Commissions to make jurisdictional findings of fact, no order of a Commission is valid without such findings, as without them, there can be no jurisdiction.

It is a general rule of law that there are no presumptions in favor of the validity of orders of a tribunal such as the public utilities commission, and no presumption of jurisdiction exists under the law which will obviate the necessity of proper findings of jurisdictional facts. As was said in Union Pacific Rld. Co. vs. Public Utilities Commission, 95 Kans. 604, approving and quoting the Michigan Supreme Court:

"The important business of the commission with respect to rates is ascertaining the facts."

106 The case of Detroit, etc., R. R. Co., v. Railroad Commission 171 Mich., 335, 137 N. W. 329.

This is the case from which the quotation last above set out was taken by the Kansas Supreme Court, referred to and quoted from at page 9 of this court's opinion as follows:

"That the Commission, when making the order complained of, made no special findings of fact is wholly immaterial, as there is nothing in the Act creating the Commission and defining its duties and powers requiring it. As said in Detroit, Etc., R. R. Co. vs. Railroad Commission, 171 Mich. 335, 137 N. W. 329: 'It is unfortunate that the courts do not have the assistance which would be derived from a finding made by the Commission which would distinctly

state the ultimate facts found and the factors, at least the controlling factors, considered in determining whether a rate was or was not reasonable."

We respectfully submit that the court has misapprehended and misunderstood the entire decision in this case. The conclusion of this court announced in its opinion quoted above is in effect that the Public Utilities Commission of Michigan in the case referred to made no findings of fact, and that the Court, although lamenting the absence of such findings of fact, sustained the opinion of the Michigan Commission notwithstanding the absence of such findings. This court's conclusion is wholly incorrect. An examination of the opinion in question discloses that the Michigan Commission specifically found that the existing rates complained of were "unjust, unreasonable and excessive." The Supreme Court of Michigan, in its
107 opinion, reported in 137 N. W. at page 338, specifically so holds and states its holding in the following language:

"(9) The Michigan Railroad Commission found that the rates charged for the transportation of logs in car load lots to the city of Alpena are unjust, unreasonable, and excessive."

And again, at page 339 of the same report, the Supreme Court of Michigan says:

"The complainant has not shown, to our satisfaction, that the finding (of the Commission) that the specific rates for logs in car loads to Alpena are per se unreasonable and excessive ought to be disturbed."

And again same page:

"The cancelled tariff has been found to be unjust and unreasonable. We are unable to say that the finding was wrong."

It, therefore, clearly appears that this court misunderstood and misapplied the Michigan case. We respectfully request a rereading of this case by the court. Such rereading will disclose that the Michigan court not only adopted the general rule, as to the necessity for findings by the Commission, upon which we rely, but, in addition thereto, it held that the Commission had found the rates complained of to be "unjust, unreasonable and excessive." And in announcing the necessity for findings by the Commission, and in defining the province and powers of commissions generally, it used this language, 137 N. W. 333:

108 "We apprehend that the words 'reasonable and just' in the statute do not mean nonconfiscatory, as the word 'confiscatory' is usually defined. The Legislature has not fixed the freight rates to be charged by complainant beyond this: It has prohibited and made unlawful every unjust and unreasonable charge. It permits reasonable and just rates to be charged for services performed. It has confided to the Michigan Railroad Commission the power, with

the duty, to ascertain, in proper cases, whether a rate is reasonable and just or unreasonable and unjust, and to thereupon make an order in conformity with the facts. The facts being found, it is the Legislature which speaks approvingly or disapprovingly, as the case may be. The important business of the Commission with respect to rates is ascertaining facts. Its findings are not conclusive, but have the effect of establishing prima facie that the rates considered are reasonable and just and therefore lawful, or are unreasonable and unjust and unlawful."

And again:

"Presumptively, the findings and orders of the Commission are right."

It is clearly stated by the Michigan Court in the above quotation that the important business of the Commission with respect to rates is ascertaining the facts and the making of findings which though not conclusive are when made presumptively right. Without such findings there is not and never can be any presumption in favor of a Commission rate.

The language quoted by this Honorable Court from this opinion follows the above quotation, and is simply a criticism of the findings actually made by the Michigan Commission because its findings did not "distinctly state the ultimate facts and the factors, at least the controlling factors, considered in determining whether the rate was or was not reasonable."

109

The word "courts" as used in the sentence quoted by this court refers only to the court in the case then at bar. The Michigan Supreme Court was simply lamenting the fact that the findings actually made were not as full and distinct as they should be, and that the ultimate facts and factors controlling the decision of the Commission were not set out in detail. The court, going on, says:

"We notice, in this connection, that in returning the testimony to the Circuit Court the Commission states that its original conclusions are confirmed by a personal examination of the locality in which the service of complainant is performed, and by knowledge acquired independent of the testimony produced before it.* Manifestly this court cannot share in knowledge so acquired, unless evidence of the facts discovered, or supposed to have been discovered, is in some way brought upon the record."

In other words, the Supreme Court of Michigan in this opinion complained because, although the Michigan Commission found the facts, it did not set out the evidence which supported such findings. There are, as we will show and have shown, cases which actually re-

*(NOTE.—After suit was filed in court to set aside the Commission's order in this case, the court re-referred the case to the Commission for additional findings of fact, and the Commission, after re-examining the record, reiterated and adhered to its former findings.)

quire that the evidence supporting the findings be set out, but no well considered case has ever held that findings are unnecessary. The Michigan court not only did not so hold but, on the con-
110 trary, held, as repeatedly shown above, that the important business of the Commission with respect to rates is ascertaining facts. Without ascertaining such facts—making findings, neither the Michigan Commission nor any other Commission has or can have any jurisdiction to modify or change rates, or substitute new rates for old ones. The quotation made at length from the Michigan opinion, 137 N. W. 333, above, is set out in full and approved by the Supreme Court of Kansas in the case of Railroad Co. vs. Public Utilities Commission, 95 Kans. 621. With all due respect to this Honorable Court, it cannot even be reasonably presumed or inferred that the Supreme Court of Michigan, in the case referred to, did or would have for a moment entertained the idea of sustaining the order of the Michigan Commission had there been no findings that the rates complained of were "unjust, unreasonable and excessive," and that the rates substituted therefor were just and reasonable. It, therefore, follows that the conclusion announced by this court "that the Commission * * * made no special findings of fact is wholly immaterial," is not sustained by the authority cited and relied upon by this court.

An examination of the Michigan Commission Act discloses that its provisions relative to findings are not materially different from those of the Kansas Commission Act.

The Supreme Court of the United States, in Galpin vs. Page, 85 U. S. 350, opinion 366, announces the jurisdictional rule as
111 applied to commissions and other bodies clothed with limited and special authority, as follows:

"The rule (regarding presumption as to the existence of jurisdictional facts) is different with respect to courts of limited and special authority; as to them there is no presumption of law in favor of their jurisdiction; that must affirmatively appear by sufficient evidence or proper averments in the record, or their judgments will be deemed void on their face."

Corpus Juris, Vol. 15, p. 842, Sec. 62, announces the rule as follows:

"There being no presumption in favor of a court of inferior, limited, or special jurisdiction, it is usually considered necessary, in order to sustain the proceedings of such a court, that the record should affirmatively show that the court had jurisdiction."

And in this connection, we wish to show that unless the record of the Kansas Commission in any case affirmatively shows that it actually made the finding required by the provisions of sections 13 and 16 of the Commission Act, the Commission is without jurisdiction, and any order made by it under such circumstances is absolutely void.

While it is true, as this court announces, that the Statutes of Mis-

souri require the findings of the Commission of that State to be reduced to writing, the Supreme Court of that state, in Ramsey vs. Huck, et al., 184 S. W. 933, opinion 938, announces the general rule applicable to inferior tribunals in the following language:

112 "Furthermore, the fact must be borne in mind that county courts are inferior tribunals, not proceeding according to the course of the common law, but confined to the authority given them by statute, and that the grounds of their jurisdiction must appear affirmatively on the face of their records."

The Supreme Court of Alabama, considering the validity of the Commissioner's Court in Commissioners vs. Johnson, 39 So. 910, opinion 911, says:

"The Commissioners' Court, in the exercise of statutory powers, as were conferred by the act in question, is a court of limited jurisdiction, and to uphold its proceedings under the statute, its records must affirmatively show the existence of the facts upon which its authority rests."

Bailey on Jurisdiction, Vol. 1, Sec. 129, at pages 107 and 108, lays down the rule as follows:

"With respect to statutory courts, the rule is that when a court is created by the legislature with particular powers expressly conferred, the record of their proceedings must affirmatively show a compliance with the statutory requirements, and that as to such matters favorable presumption will not be indulged in, and the same rule applies to other tribunals exercising judicial powers, though not strictly courts of justice, such as commissioners of patents, commissioners of land offices, municipal council in respect to proceedings authorized by statute, county commissioners in the exercise of such powers, town authorities in respect to laying out roads or exercising statutory functions."

113 And continuing:

"The decisions of such bodies, are in respect of collateral attack, governed by the same rules as the judgments of inferior courts. Thus, an inferior board may determine conclusively its own jurisdiction or power by adjudicating the existence of facts upon which its jurisdiction or power depends; but when, however, the power depends not upon the existence or non-existence of matters in pais to be established by evidence, but upon allegations in a petition, a portion of the record, the question is not the same. In such case there must appear in the petition the statutory requisites."

In addition to these authorities the Kansas Supreme Court has specifically passed upon the question and held in Kaul vs. Telephone Company, 95 Kans. 1, opinion 4, that rates fixed by contract remain in force until the commission has found them to be unreasonable. The language used by the Supreme Court of Kansas is as follows:

"Granting, without deciding, that the commission has the power

under the law to determine whether or not the rates prescribed by the contract are reasonable and valid, and to revise them if found to be unreasonable, it does not appear that it has exercised the power, nor that they have been presented for its consideration. The passage of the act did not automatically overthrow contracts, nor set aside schedules of rates which had been agreed upon. Neither
114 did the fact that the defendant published and filed a schedule of rates with the public utilities commission abrogate the contract. In any event, rates previously agreed upon between utilities and patrons will continue in force until the commission has found them to be unreasonable."

It is, we believe, unnecessary to cite further authorities on this point. There are many cited in appellee's brief herein, on page 22 and following. It is sufficient to note:

1. That the Kansas Statutes—Sections 13 and 16 of the Commission Act, quoted above—not only require the Commission to find existing rates unreasonable, discriminatory, etc., before it can substitute others therefor, but said sections also require that the decisions or findings of the Commission shall be reduced to writing. Neither of which jurisdictional prerequisites was followed by the Commission in this case, and its order is, therefore, void.

2. That, independent of statutory requirements, the law is that before existing rates can be changed by a commission, its record must affirmatively show the findings upon which its jurisdiction is based. Otherwise, its orders are made without jurisdiction and are void. No such findings were made by the Commission in this case. The record does not show any such findings and its order is, therefore, void.

We respectfully submit that the authorities quoted show that the court is not justified in indulging the presumption that find-
114a ings were made by the Commission. The only presumption in favor of the order of a Commission is that the rates fixed therein are prima facie reasonable, but this presumption can be indulged only when the jurisdictional facts upon which the order is based are found and made to appear on the face of the record.

VI.

We submit that the court erred in holding that "the fact that the plaintiff's business is conducted wholly within the city of Wichita is immaterial. Pawhuska v. Pawhuska Oil Co., 250 U. S. 394."

This point was not strongly urged in appellee's brief, and on account of lack of time was not strongly presented in the argument, and we believe that for this reason the court has inadvertently misunderstood the nature of appellee's contention. The contention of appellee is that Section 3 of the Public Utilities Act specifically excludes from control and regulation by the Public Utilities Commission of Kansas all utilities and common carriers situated or operated wholly within any city, or principally operated for the benefit of such

city or its people. Appelle, The Wichita Railroad and Light Company, is operated wholly within the city of Wichita, and operated wholly or principally for the benefit of such city or its people. Appellee's claim is that it is, therefore, outside of the jurisdiction
114*b* and regulatory powers of the Public Utili ies Commission. The language used in Section 3 of the Public Utilities Act is as follows:

"The power and authority to control and regulate all public utilities and common carriers situated and operated wholly or principally wi hin any city, or principally operated for the benefit of such city or its people, shall be vested exclusively in such city, subject only to the right to apply for relief to the Public Utilities Commission as herein provided in Section 33."

Section 33 simply provides that an appeal may be had from the action of a ci y council or commission to the Public Utilities Commission in certain cases, none of which have any application to the facts of this case.

The question decided in Pawhuska vs. Pawhuska Oil Co., 250 U. S. 394, cited by the court, has no relation whatever to the question presented by the appellee. All that is decided in the Pawhuska case is that, the state having taken from the city the power of regulation and control, and transferred it to the Public Utilities Commission, that power thereafter rests exclusively in the Public Utilities Commission. This is conceded, but this decision has no relation whatever to the contention made by the appellee. Its contention is that the control and regulation of the Wichita Company is, by Section 3 of the Public Utilities Act, specifically reserved to and vested in the city of Wichita, and therefore it can not be regulated or controlled, as to rates or otherwise, by the Public Utilities Commission.

It is true that The Kansas Gas and Electric Company, being an inter-city utility, its rates are subject to control and regula-
115 tion by the Commission. State ex rel vs. Wyandotte Coun'y Gas Co., 88 Kan. 165. The question here presented then is, what rule shall be applied when the rates of two utili ies are involved, one of which is subject to the jurisdiction of the Utilities Commission, and the other is subject to the jurisdiction of the city in which it is located.

A question of conflict of jurisdiction is here squarely presented. This court is called upon to determine what shall be done in this situa'ion.

Wherefore, For all the reasons hereinbefore given, your petitioner earnestly prays that a rehearing be granted herein, and thereon that this Honorable Court enter its order and decree affirming the judgment and decree of the trial court in this cause.

THE WICHITA RAILROAD AND LIGHT COMPANY,
By THOMAS F. DORAN,
HENRY I. GREEN,
Its Attorneys.

GREEN & PALMER,
HARRIS & HARRIS, *Of Counsel.*

116 *Certificate.*

We, the undersigned, as solicitors for petitioner, The Wichita Railroad and Light Company, appellee in the above entitled cause, hereby certify to this Honorable Court that in our judgment the foregoing petition for rehearing is well grounded in fact and law, and that the same is not interposed for delay.

THOMAS F. DORAN,
HENRY I. GREEN,
Solicitors for Petitioner,
The Wichita Railroad and Light Company.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Sep. 10, 1920.

117 (*Order Denying Petition for Rehearing.*)

December Term, 1920.

Thursday, December 9, 1920.

This cause came on this day to be heard upon the petition for a rehearing, filed by counsel for appellee.

On consideration whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby, denied.

December 9, 1920.

(*Motion of Appellee for Stay of Mandate.*)

Comes now the Appellee in the above entitled cause, by Thomas F. Doran and Henry I. Green, its solicitors, and moves the Court for an order staying the sending down of the mandate of the Circuit Court of Appeals herein, for the period of sixty days, pending the preparation of the necessary pleadings and papers for review by the Supreme Court of the United States by certiorari or appeal as counsel shall determine.

And your petitioner respectfully shows that the time requested is necessary for preparation of pleadings and papers for such review; and the solicitors for your petitioner state that in their judgment your petitioner is entitled to a review of the judgment of this court in the Supreme Court of the United States, and that petition therefor by certiorari or appeal is well founded in fact and in law, and that the same is not interposed for delay.

118 Respectfully submitted,
THE WICHITA RAILROAD AND LIGHT COMPANY,
(*Appellee,*)
By THOMAS F. DORAN,
HENRY I. GREEN,
Its Solicitors.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Dec. 15, 1920.

(Order Staying Mandate.)

December Term, 1920.

Friday, December 17, 1920.

On motion of appellee for an order staying the issuance of the mandate in this cause for a period of sixty days pending the preparation of necessary pleadings and papers for review by the Supreme Court of the United States for certiorari or appeal, as counsel shall determine, It is now here ordered by this Court that the mandate in this cause be, and the same is hereby, stayed for a period of 60 days from this date and if a petition for certiorari is submitted to the said Supreme Court within that time or an appeal perfected the mandate will then be withheld until the disposition of the case in the said Supreme Court.

December 17, 1920.

119 *(Motion of Appellant for Order Requiring Appellee to File Additional Injunction Bond.)*

Now comes the appellant Kansas Gas and Electric Company and represents to the Court:

On the 24th day of April, 1918, the Judge of the United States District Court for the District of Kansas issued a temporary restraining order herein restraining the Public Utilities Commission of the State of Kansas and the members thereof, their agents and attorneys, from enforcing or attempting to enforce the order of said Commission dated the 25th day of March, 1918, and from putting into effect or attempting to put into effect said order; that the said order contained the rates and added surcharges complained of in the bill of complaint herein and which said order appellee, in its said bill of complaint, sought to have adjudged void. A copy of said temporary restraining order is set out at pages 30 and 31 of the transcript of the record herein.

On the 25th day of May, 1918, a stipulation was filed in said District Court by which the parties to said suit stipulated and agreed that the said restraining order should continue and remain in force until the further order of the court as a temporary injunction, and that the plaintiff (appellee) should forthwith execute and deliver a good and sufficient injunction bond to be approved by the Judge of said Court for the benefit of defendant (Public Utilities Commission) and Kansas Gas and Electric Company, conditioned upon the payment of the surcharge fixed by the order of the Public Utilities Commission in its said order of March 25, 1918, and for such costs and damages as the Public Utilities Commission or Kansas Gas and Electric Company might sustain by reason

of the granting of such temporary injunction should it be finally determined that the same was improperly issued, or that might be awarded them by reason of said order. A copy of said stipula-
120 tion appears at pages 31 and 32 of the transcript of the record.

Pursuant to said stipulation the Judge of said District Court on the 27 h day of May, 1918, entered an order continuing the said restraining order in force until the further order of the court as a temporary injunction, and ordered the plaintiff to file on or before the 30th day of May, 1918, an injunction bond in the sum of $20,000.00 to be approved by the Judge of said Cour , conditioned upon the payment by plaintiff, in case said injunction upon a final hearing be found to have been wrongfully issued, all damages ascertained to have been sustained by the Public Utilities Commission and by Kansas Gas and Electric Company or either of them resulting from the issuance of said temporary injunction, including the payment by plaintiff to Kansas Gas and Electric Company of the surcharge fixed by the Public Utilities Commission by its said order of March 25, 1918 said order is hereto attached. Thereafter, on the 3rd day of June, 1918, the plaintiff, Wichita Railroad and Light Company, filed in said District Court its injunction bond, by the terms whereof the said Wichita Railroad and Light Company, plaintiff, as principal, and Kansas Casualty and Surety Company, as surety, acknowledged themselves to be indebted to the Public Utili ies Commission of the State of Kansas for the use and benefit of said Commission and of Kansas Gas and Electric Company in the penal sum of $20,000.

The condition of the bond being that, whereas, under the order of the Public Utilities Commission of the State of Kansas, made and entered on the 25th day of March, 1918, upon the application of Kansas Gas and Electric Company, the Wichita Railroad and Light Company was required to pay, in addition to the payment of rates for electricity fixed in a contract between the Wichita Railroad and Light Company and Kansas Gas and Electric Company, an added surcharge as fixed in said order, and whereas, the said United States District Court had granted a temporary injunction restraining and enjoining the enforcing and putting into effect the said order
121 insofar as it affected the Wichita Railroad and Light Company; therefore, in case said injunction, upon a final hearing, be found to have been wrongfully issued and the said Wichita Railroad and Light Company should pay the said Kansas Gas and Electric Company said surcharge in accordance with said order from the date the said order was to have taken effect, together with all costs and damages ascertained to have been sustained by the said Public Utilities Commission and said Kansas Gas and Electric Company or either of them and which might be awarded to them in case said order should be determined to have been improperly granted, then the said obligation should be null and void; otherwise it should remain in full force and effect. Said injunction bond was dated the 27th day of May, 1918, and was approved by the Judge of said Court, and a true and correct copy thereof is hereto attached.

On the 7th day of February, 1919, the Judge of said District Court entered an order permitting Kansas Gas and Electric Company to file its intervening petition herein and the said Kansas Gas and Electric Company on the said 7th day of February, 1919, filed its said intervening petition.

On the 6th day of June, 1919, the said District Court entered its decree herein sustaining the motion of plaintiff for judgment on the pleadings and upon the stipulation above referred to herein, and adjudging the said order of the Public Utilities Commission of March 25, 1918, null and void, and making the said temporary injunction permanent and perpetually enjoining the said Public Utilities Commission and Kansas Gas and Electric Company from enforcing or attempting to enforce against the plaintiff the said order of March 25, 1918, and further ordering and adjudging that the said bond be cancelled and that the said plaintiff, the Wichita Railroad and Light Company and the Kansas Casualty and Surety Company, surety therein, be each released and discharged from any and all further liability thereunder.

122 From said final decree defendants Public Utilities Commission and Kansas Gas and Electric Company appealed to this court, and this court on the 15th day of July, 1920, reversed the said Decree of the District Court and held that said court erred in making said injunction perpetual. This court, on the 17th day of December, 1920, on the application of the appellee, entered its order staying the mandate herein for a period of six y days from and after December 17, 1920, in order that the said appellee might present its petition for a writ of certiorari to the Supreme Court of the United States or perfect an appeal to said court.

Appellant, Kansas Gas and Electric Company, represents that the said injunction bond, being in the penal sum of $20,000.00 was good and sufficient at the time it was given but that it has ceased to be a good and sufficient bond by reason of changed circumstances and conditions. Said changed circumstances and conditions are that since said bond was filed, and pending the final decision of this court, there has gradually accrued and become due appellant, Kansas Gas and Electric Company under the aforesaid surcharge order, the sum of $33,931.13, excluding interest. The amount of said bond is, therefore, now and will continue to be insufficient to secure the payment of the amount which will be due appellant, Kansas Gas and Electric Company, if the said order of the Public Utilities Commission of March 25th, 1918, is finally determined to be a valid order and effective against the said Wichita Railroad and Light Company.

Wherefore, appellant Kansas Gas and Electric Company moves the court for an order requiring appellee, Wichita Railroad and Light Company, to increase said bond in a sum sufficient to secure the payment of said sum of $33,931.13 with interest, together with all costs and damages which may hereafter be ascertained to have been
123 sustained by the appellants herein on account of the issuance of said temporary injunction, or that the appellee, Wichita

Railroad and Light Company, be required to file an additional and supplemental bond sufficient for said purpose.

Respectfully submitted,

KANSAS GAS AND ELECTRIC COMPANY,
Appellant.
By McCUNE, CALDWELL & DOWNING,
Its Attorneys.

County of Jackson, ss:
STATE OF MISSOURI,

L. O. Ripley, being first duly sworn, upon his oath says that he is Vice President of appellant Kansas Gas and Electric Company; that he has read the foregoing motion and is familiar wi h the statement of facts contained therein and that said statement is true.

L. O. RIPLEY.

Subscribed and sworn to before me this 4th day of January, 1921. My commission expires May 31, 1921.

[SEAL.] ANNE C. HARTNETT,
Notary Public in and for said County and State.

124 In the District Court of the Uni'ed States for the District of Kansas, First Division.

No. 259.

THE WICHITA RAILROAD AND LIGHT COMPANY, a Corporation, Plaintiff,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS, Defendant.

Order.

This cause came on for hearing this 27th day of May, 1918, upon the stipulation of the par ies for the issuance of a temporary injunction, and the court being fully advised in the premises Orders and Adjudges:

1. The restraining order heretofore issued herein shall continue and remain in force until the further order of the Court as a temporary injunction:

2. The plaintiff, shall on or before the 30th day of May, 1919, file herein an injunction bond in the sum of twenty thousand dollars, to be approved by the Judge of this Court, conditioned to pay, in case said injunction upon a final hearing be found to have been wrong-

fully issued, all damages ascertained herein to have been sustained by the defendant and by Kansas Gas and Electric Company, or either of them, resulting from the issuance of said temporary injunction, including the payment by the plaintiff to Kansas Gas and Electric Company of the surcharge fixed by the Public Utilities Commission of the State of Kansas by its order of March 25, 1918, from the date when said order was to take effect.

Dated May 27th, 1918.

JOHN C. POLLOCK,
Judge.

O. K.
JACKSON.
H. L. McCUNE.

125 Endorsed: No. 259-N. In the District Court of the United States for the District of Kansas, First Division. The Wichita Railroad and Light Co., a corporation, Plaintiff vs. Public Utilities Commission of the State of Kansas, Defendant. Order continuing Restraining Order in force and that Injunction Bond be filed. Filed May 27, 1918, F. L. Campbell, Clerk.

* * * * * * *

Injunction Bond.

Know all men by these presents: That we, The Wichita Railroad and Light Company, as principal, and The Kansas Casualty and Surety Company, of Wichita, Kans. as surety, acknowledge ourselves to owe and stand indebted to the Public Utilities Commission of the State of Kansas for the use and benefit of said Public Utilities Commission and of Kansas Gas and Electric Company, a corporation, in the penal sum of Twenty Thousand and no/100 dollars, for the payment of which we bind ourselves, our successors and assigns.

The condition of this obligation is such, that

Whereas, under the order of the Public Utilities Commission of the State of Kansas made and entered on the 25th day of March, 1918, upon the application of Kansas Gas and Electric Company, The Wichita Railroad and Light Company was required to pay, in addition to the payment of the rates for electricity fixed in a contract between The Wichita Railroad and Light Company and Kansas Gas and Electric Company, an added surcharge as fixed in said order, and

Whereas, the Court in the above entitled cause has granted a temporary injunction restraining and enjoining the enforcing or putting into effect of said order of the Public Utilities Commission in so far as the same affects The Wichita Railroad and Light Company.

126 Now, Therefore, in case said injunction upon final hearing be found to have been wrongfully issued, and The Wichita Railroad and Light Company pays to the Kansas Gas and Electric Company said surcharge in accordance with said order of the Public Utilities Commission from the date that said order was to take effect, together with all costs and damages ascertained herein to have been sustained by the said Public Utilities Commission and Kansas

Gas and Electric Company, or either of them, which may be awarded to them in case said order shall be finally determined to have been improperly granted, then this obligation shall be null and void; otherwise it shall be and remain in full force and effect.

Witness our hands and seals this 27th day of May, 1918.

THE WICHITA RAILROAD AND LIGHT COMPANY,
By A. M. PATTON,
Asst. General Manager.

Attest:

—— ——,
Secretary.

THE KANSAS CASUALTY & SURETY COMPANY.
J. W. MORSE, (?),
President.

Attest:
[SEAL.] GEO. D. —— (?),
Secretary.

Approved June 1st, 1918.
JOHN C. POLLOCK,
Judge.

O. K.
F. S. JACKSON.

Endorsed: #259-N. Injunction Bond. Filed June 3, 1918. F L. Campbell, Clerk.

127 (Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 7, 1921.

(Order Requiring Appellee to File Additional Injunction Bond for $20,000.00.)

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1920.

No. 5529.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS et al., Appellants,

vs.

THE WICHITA RAILROAD AND LIGHT COMPANY.

Appeal from the District Court of the United States for the District of Kansas.

Tuesday, January 11, 1921.

This cause came on for hearing this 11th day of January, 1921, upon the motion of appellant, Kansas Gas and Electric Company,

for an order requiring appellee to file an additional injunction bond, and the Court being fully advised in the premises, orders and adjudges:

That the Appellee shall forthwith file herein an additional injunction bond in the sum of Twenty Thousand ($20,000.00) Dollars, to be approved by a Judge of this Court, containing terms and provisions identical with the original injunction bond for Twenty Thousand ($20,000.00) Dollars, which was filed by appellee herein pursuant to the order of the District Court of the United States for the District of Kansas, dated May 27, 1918.

January 11, 1921.

128 (*Motion of Appellee to Modify Opinion and Decree.*)

The Wichita Railroad and Light Company, appellee in the above entitled cause respectfully moves the Court to make more specific and certain the opinion and decree entered in this Court in said cause.

And in support of this motion appellee shows:

The concluding paragraph of the majority opinion reads as follows: "The Court below erred in refusing to dissolve the temporary injunction and making it perpetual. The case is Reversed with directions to proceed in conformity with the views expressed herein."

Counsel for the respective parties in interest are in doubt as to the proper proceeding to be followed in the District Court for the District of Kansas in carrying into effect the decision and decree entered by this Court as above recited. Counsel for appellee are of opinion that under the decree of this Court nothing remains to be done by the District Court for the District of Kansas except to enter an order dissolving the temporary injunction, the bill in this case having been filed solely to procure a perpetual injunction against the enforcement of an order of the Public Utilities Commission of the State of Kansas. If counsel be correct in this opinion then appeal to the Supreme Court of the United States lies from the judgment and decree of this Court in said case.

However, other counsel interested in said case are of opinion that upon this cause being remanded from this Court to the District Court for the District of Kansas, that Court would proceed to consider the evidence under the issues tendered by the pleadings dependent for conclusion upon the evidence proofs and testimony, competent and relevant thereto. If this construction of the decree of this Court be correct, then the order entered by this Court in said cause may not be final and the right of appeal to the United States Supreme Court may not at this time be exercised.

129 Appellee, therefore, respectfully prays the entry by this Court of such modification to the opinion heretofore filed in said cause as may make specific and certain the proper proceeding required by the decision of this Court to be had in the District

Court below pursuant to the opinion and decree in this cause heretofore entered by this Court.

WICHITA RAILROAD & LIGHT CO.,
By THOS. F. DORAN,
HENRY I. GREEN,
Attorneys for Appellee.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 11, 1921.

(Suggestions of Appellant Kansas Gas and Electric Company on Motion of Appellee to Make Decree More Specific.)

On January 11, 1921 the appellee filed herein an application praying the entry of such modification of the opinion heretofore filed herein as may make specific and certain the proper proceedings required by the decision of this Court to be had in the court below, reciting as cause that counsel were uncertain whether the decision requires the dissolution of the temporary injunction and dismissal of the bill of complaint or permits of a trial upon the merits.

Appellant Kansas Gas and Electric Company respectfully suggests:

130 The bill of complaint in this cause was based upon Section 21, Chapter 238, Laws of Kansas, 1911, (Appellant's brief p. 20) which provides in substance that any person being dissatisfied with an order of the Public Utilities Commission may commence an action to vacate such order as unlawful and unreasonable. Appellee's bill of complaint alleged that the rates prescribed by the order in question were unlawful, unreasonable, discriminatory, preferential and confiscatory. Issue was joined upon those allegations but before trial appellee filed a motion for judgment on the pleadings on the ground that the order complained of was void on its face for certain named reasons. Appellee's motion for judgment on the pleadings was sustained and the court below thereupon entered a decree making the temporary injunction perpetual. From that decree an appeal was taken to this Court, resulting in a reversal of said decree.

Since the cause has not been heard upon the merits and the issues of fact tendered by appellee's bill of complaint counsel for this appellant have been, and still are, of the opinion that the decision of this Court requires a trial upon the merits upon remand. In other words, counsel conceive the situation to be the same as when in a suit at law, a demurrer is sustained, judgment rendered accordingly and upon appeal the judgment is reversed with directions to proceed in conformity with the views expressed by the appellate court.

We are not unmindful that the concluding paragraph of the majority opinion states: "The court below erred in refusing to dissolve the temporary injunction and making it perpetual." But

considering the whole opinion and in view of the issues in this Court which did not include the question of the propriety of the temporary injunction we think the Court held that the court below erred in sustaining the appellee's motion for judgment on the pleadings and in making the injunction perpetual.

This appellant therefore respectfully prays the Court to
131 modify said opinion so as to remove any question of the propriety of the District Court's proceeding to hear the cause on the merits in accordance with the views expressed in the opinion of this Court.

McCUNE, CALDWELL & DOWNING,
Attorneys for Appellant,
Kansas Gas and Electric Company.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 13, 1921.

(*Additional Injunction Bond.*)

Know all men by these presents: that we, The Wichita Railroad and Light Company, a corporation, as principal, and United States Fidelity and Guaranty Company of Baltimore, Maryland, as surety, acknowledge ourselves to owe and stand indebted to the Public Utilities Commission of the State of Kansas for the use and benefit of said Public Utilities Commission and of Kansas Gas and Electric Company, a corporation, in the penal sum of $20,000.00 for the payment of which we bind ourselves, our successors and assigns.

The condition of this obligation is such that:

Whereas, in the order of the Public Utilities Commission of the State of Kansas made and entered on the 25th day of March, 1918, upon the application of the Kansas Gas and Electric Company, the Wichita Railroad and Light Company was required to pay in addition to the payment of the rates for electricity fixed in a contract between the Wichita Railroad and Light Company and Kansas Gas and Electric Company an added surcharge as fixed in said order, and

Whereas, the District Court of the United States for the District of Kansas in the above entitled cause has granted a tem-
132 porary injunction restraining and enjoining the enforcing or putting into effect of said order of the Public Utilities Commission insofar as the same affects the Wichita Railroad and Light Company, and

Whereas, thereafter said temporary injunction was made perpetual by an order and decree of said Court, from which order and decree an appeal was perfected to this Court, resulting in the reversal of said order and decree of the District Court of the United States for the District of Kansas, and

Whereas, the original injunction bond in the penal sum of $20,000.00 required in the Court below, though good and sufficient at the time, has become and now is inadequate in the amount of the penalty thereof to protect appellant, Kansas Gas and Electric Com-

pany in the event that it shall be finally determined that said injunction was improperly issued, and

Whereas, this Court by an order entered this day has required appellee to file with the Clerk of this Court an additional injunction bond in the penal sum of $20,000.00, containing terms and provisions identical with those of the original injunction bond.

Now, therefore, in case said injunction upon final hearing be found to have been wrongfully issued and the Wichita Railroad and Light Company shall thereupon pay to the Kansas Gas and Electrict Company said surcharge in accordance with said order of the Public Utilities Commission from the date that said order was to take effect together with all costs and damages ascertained herein to have been sustained by the Public Utilities Commission and Kansas Gas & Electric Company, or either of them, which may be awarded to them in case said order shall be finally determined to have been improperly granted, then this obligation shall be null and void; otherwise it shall be and remain in full force and effect, as an additional security to Appellant, Kansas Gas and Electric Company in the premises.

133 Witness our hands and seals this 11th day of January, A. D. 1921.

THE WICHITA RAILROAD AND LIGHT COMPANY,
By HENRY I. GREEN,
Attorney in Fact.

[SEAL.] UNITED STATES FIDELITY AND GUARANTY COMPANY,
By SIDNEY R. OVERALL,
Attorney in Fact.

Approved January 14, 1921.
WALTER H. SANBORN,
United States Circuit Judge,
Eighth Circuit.

O. K.
——— ———,
Attorneys for Appellant
Kansas Gas and Electric Co.

* * * * * * *

(Certified copy of Power of Attorney from United States Fidelity and Guaranty Company to Sidney R. Overall and others attached to original Bond.)

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 14, 1921.

134 (*Order Modifying Opinion and Vacating Decree, etc.*)

December Term, 1920.

Monday, January 17, 1921.

This cause came on to be heard on the motion of appellee to modify the opinion and decree of this Court and on the suggestions of the appellant, Kansas Gas and Electric Company.

On consideration whereof, and in pursuance of said motion, it is ordered by this Court that the last paragraph of the majority opinion of this Court filed July 15, 1920, be, and the same is hereby corrected to read as follows:

"The court below erred in refusing to dissolve the temporary injunction and making it perpetual. The case is reversed and remanded with instructions to the trial court to dismiss the complaint."

It is further ordered that the decree of this Court of July 15, 1920, in accordance with said opinion as then filed be, and the same is hereby set aside, vacated and held for naught and that a new decree be entered as of July 15, 1920, in conformity with the opinion of this Court as above corrected.

January 17, 1921.

135 (*Decree, January* 17, 1921, *as of July* 15, 1920.)

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1920.

No. 5529.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS and KANSAS GAS AND ELECTRIC COMPANY, Appellants,

vs.

THE WICHITA RAILROAD AND LIGHT COMPANY.

Appeal from the District Court of the United States for the District of Kansas.

Thursday, July 15, 1920.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Kansas, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that

The Public Utilities Commission of the State of Kansas, and Kansas Gas and Electric Company have and recover against The Wichita Railroad and Light Company the sum of — Dollars for their costs in this behalf expended and have execution therefor.

It is further ordered that this cause be, and the same is hereby, remanded to the said District Court with instructions to dismiss the complaint.

July 15, 1920.

(Filed and entered on January 17, 1921, as of July 15, 1920.)

136 (*Petition for Appeal to Supreme Court U. S.*)

To the Honorable Judges of the United States Circuit Court of Appeals, Eighth Circuit:

The above named Appellee, The Wichita Railroad and Light Company, feeling aggrieved by the decision, judgment and decree entered in the above entitled proceedings, does hereby appeal from said decision, judgment and decree to the Supreme Court of the United States, for the reasons set forth in the assignment of errors filed herewith, and prays that this its appeal may be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decision, findings and decree were based, duly authenticated, be sent to the Supreme Court of the United States sitting at the City of Washington, District of Columbia, under the rules of such court in such cases made and provided.

And your Petitioner further prays that the proper order relating to the security to be required of it be made.

HENRY I. GREEN,
THOMAS F. DORAN,
Attorneys for Appellee.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 22, 1921.

(*Assignment of Errors on Appeal to Supreme Court U. S.*)

Comes now The Wichita Railroad and Light Company, appellee in the above entitled cause, and files the following assignment of errors upon which it will rely in the prosecution of the appeal
137 taken by it to the United States Supreme Court in the above entitled cause, from the decision, judgment and decree made by the United States Circuit Court of Appeals for the Eighth Circuit on the 15th day of July, 1920, which decree did not become final for the purposes of appeal until appellee's petition for rehearing was considered and on the 9th day of December, 1920, denied.

I.

That the United States Circuit Court of Appeals for the Eighth Circuit in said decision, judgment and decree erred in deciding, adjudging and decreeing that the United States District Court for the District of Kansas erred in enjoining the order of the Public Utilities Commission of the State of Kansas, of March 25th, 1918, in that:

1. Said decision, judgment and decree of said Circuit Court of Appeals reversing the United States District Court for the District of Kansas upholds and validates an order of the Public Utilities Commission of the State of Kansas, of March 25th, 1918, which order, in violation of Section Ten of Article One of the Constitution of the United States, arbitrarily abrogates, nullifies and sets aside a written contract, and rates specifically agreed upon therein, without any claim, pleading, statement or finding:

a. That the rates fixed in said written contract are prefere-ial or discriminatory, or that they are reasonable or unreasonable.

b. That they cast any undue burden upon other consumers or upon the public.

c. That they are so low as to make the performance of the contract impossible.

d. That they are so low that they compel the exaction of higher rates from other consumers or from the public.

e. That they, in any way, imperil the solvency of the Kansas Gas and Electric Company, the intervener, or tend to prevent it from performing its public duties.

138 *f.* That said contract, in any way, infringes the public welfare; the public health; the public morals; the public safety or otherwise falls within the regulatory police powers of the State.

And that:

2. The written contract thus abrogated by the order of the Public Utilities Commission of the State of Kansas was entered into between the Wichita Railroad and Light Company and the Kansas Gas and Electric Company on the 2nd day of May, 1910, and by its terms continued in full force and effect until the 30th day of November, 1930; that said contract specifically fixed the rates to be paid by the Wichita Railroad and Light Company to the Kansas Gas and Electric Company for electric energy furnished by the latter company during the continuance thereof; that the order of the Public Utilities Commission of the State of Kansas, of March 25th, 1918, under the facts and circumstances above stated, abrogated said written contract and substituted other and higher rates for those agreed upon therein by the parties; that said contract was made and entered into prior to the enactment by the legislature of the State of Kansas of the law creating said commission, was valid when made and in full

force, effect and operation when the Public Utilities Commission came into existence as a creature of the State.

II.

The Circuit Court of Appeals erred in holding and decreeing that the District Court erred in enjoining said order of the Public Utilities Commission under the facts and circumstances recited in Subdivision 1 of paragraph I of this Assignment of Errors, in that:

1. The issue presented upon the record did not and does not involve, nor did nor does the appellee question, the power of a public utilities commission, in a proper case upon proper claim,
139 pleadings, showing and findings, to modify, abrogate and set aside contract rates in the proper exercise of the regulatory police powers of the State, even though the contract fixing such rates was entered into prior to the enactment of the state law creating the commission, where the order of the commission is founded upon a claim, pleading, statement and findings that the contract rates:

a. Are preferencial or disc-iminatory.

b. Are so low as to cast an undue burden upon the consumers or upon the public.

c. Are so low as to make the performance of the contract impossible.

d. Are so low as to compel the exaction of higher rates from other consumers or from the public.

e. Are so low that they, in any way, imperil the solvency of the Kansas Gas and Electric Company or tend to prevent it from discharging its public duties.

f. That said contract, in any way, infringes the public welfare, the public health; the public morals; the public safety or otherwise falls within the regulatory police powers of the State.

And in that:

2. The record in this case, the opinion of the District Court and the opinion of the Circuit Court of Appeals show and admit that the order of the Public Utilities Commission of Kansas is not founded on any such necessary claim, pleading, statement or findings, but is based only upon the claim that the net revenues of the Kansas Gas and Electric Company will be temporarily decreased if the contract rates are not increased.

And in that:

140 3. The decision of the Circuit Court of Appeals in reversing the decision of the United States District Court and in upholding and validating the order of the Public Utilities Commission of Kansas gives effect to said order which arbitrarily abrogates the

provisions of the written contract between the Wichita Railroad and Light Company and The Kansas Gas and Electric Company in violation, not only of Section Ten, Article One, Constitution of the United States, under the facts and circumstances disclosed by the record, but also deprives the Wichita Railroad and Light Company of its property without a hearing or trial in violation of the provisions of Section One of the Fourteenth Amendment to the Constitution of the United States, which forbids any State to deprive any person of property without due process of law or to deny to any person within its jurisdiction the equal protection of the laws.

III.

The Circuit Court of Appeals erred in deciding, finding and decreeing that the District Court erred in enjoining the order of the Public Utilities Commission of the State of Kansas, in that:

1. The Public Utilities Commission of Kansas is an administrative Board—an inferior tribunal, possessing limited jurisdiction only and possessing none of the powers of general jurisdiction of Courts of Record, but is dependent for its jurisdiction upon the specific provisions of the Statutes limiting and defining its jurisdiction and powers and prescribing the prerequisite steps necessary to jurisdiction and in that:

2. No facts are found or stated in the order of the Public Utilities Commission in question sustaining or tending to sustain the exercise of its statutory jurisdiction, powers and functions as prescribed and required in the Kansas Public Utilities Act; and no finding of the reasonableness or unreasonableness of the contract rates existing between the parties is made and no finding is made showing or tending to show any discrimination between the contract rates and other rates charged for service to other members of the Public, or other justification or excuse for making the order in question except the mere whim of the commission based on the ground that the net revenue of the intervener will be temporarily decreased if the contract rates are not increased and that said increase is solely for the benefit of the intervener and to enable it to meet increased costs due to the war.

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IV.

The Circuit Court of Appeals erred in deciding, finding and decreeing that the District Court erred in enjoining the order of the Public Utilities Commission, in that:

No charge was brought or presented to the Public Utilities Commission of Kansas challenging the validity of the contract rates in this case on any ground prescribed in the statute itself and there is no finding in the order made by the commission that any question was presented to or entertained by it on its own motion within its jurisdiction or power to change or correct and there is no finding of fact made by the commission from proofs adduced as they existed

in the contract between the parties that the rates fixed in the contract were unreasonable, unjust or discriminative or cast any undue burden upon other consumers or the public or that the rates fixed in the contract were otherwise within the regulatory police powers of the State, all of which prerequisites were necessary to the valid statutory jurisdiction of the commission to make the order in question.

V.

That the Circuit Court of Appeals erred in deciding, finding and decreeing that the District Court erred in enjoining the order of the Public Utilities Commisssion of the State of Kansas, in that:

142 1. To sustain such holding of the Circuit Court of Appeals it is necessary to presume that the rates fixed in the order of the Public Utilities Commission of Kansas are without pleadings, statement, proof or findings, prima facie reasonable on the simple statement in the order of the commission that the rates ought to be established and in that:

2. If said assumption is warranted under the Kansas statute then the statute itself is unconstitutional and in violation of Section 1 of Article 2 of the constitution of the State of Kansas which provides that "The legislative power of this State shall be vested in a House of Representatives and Senate," and in that:

3. The fixing of rates is a purely legislative act which cannot be delegated to the Public Utilities Commission or any other purely administrative body and in that:

4. If the presumption hereinbefore mentioned is warranted under the Kansas Statute creating the Public Utilities Commission then said statute is void for the reason that the act in question combines legislative, executive and judicial powers in the Public Utilities Commission in violation of Section 1 of Article 1 of the Constitution of the State of Kansas, and of Section 1 of Article 2 of the Constitution of the State of Kansas, and of Section 1 of Article 3 of the Constitution of the State of Kansas, which provisions of the constitution of the State of Kansas require that the three departments of government shall be kept separate.

VI.

The Circuit Court of Appeals erred in entering final judgment and decree herein against appellee, pursuant to the appeal to said Court from the judgment of the District Court sustaining the motion of the plaintiff for judgment on the pleadings; thus depriving appellee herein of the right to a hearing and trial upon the merits under the evidence.

143 Wherefore, the appellee, The Wichita Railroad and Light Company prays that said decision, judgment and decree of the Circuit Court of Appeals for the Eighth Circuit, herein complained of be reversed and that said Circuit Court of Appeals for

the Eighth Circuit be ordered to enter a decree reversing its decision and affirming the decision of the United States District Court for the District of Kansas.

THOMAS F. DORAN,
HENRY I. GREEN,
Solicitors for Appellee,
The Wichita Railroad and Light Co.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 22, 1921.

(*Order Allowing Appeal to Supreme Court U. S.*)

On motion of T. F. Doran, Attorney and Counsel for Complainant, it is hereby ordered that an appeal to the Supreme Court of the United States, from the decision, judgment and decree heretofore entered herein, be and the same is hereby allowed; and that a certified transcript of the record, testimony, exhibits, stipulation and proceedings be forthwith transmitted to said Supreme Court of the United States.

It is further ordered, that the bond on appeal be fixed at the sum of $500.00, the same to act as a supersedeas bond and also as a bond for costs on appeal.

Dated, the 22nd day of January, A. D. 1921.

WALTER H. SANBORN,
United States Circuit Judge,
Eighth Circuit.

144 (Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 22, 1921.

(*Order Allowing Supersedeas, etc.*)

This cause came on to be heard this 11th day of January, A. D. 1921, upon the application of the appellee for an appeal to the Supreme Court of the United States, and said appeal having been allowed, it is ordered that the same shall operate as a supersedeas, the said appellee having executed an additional injunction bond in the sum of $20,000.00 to cover accruing damages, and having also executed and filed a bond in the sum of $500. as conditioned by law covering accruing costs on appeal, and the Clerk is hereby directed to stay the issuance of the mandate of the United States Circuit Court of Appeals for the Eighth Circuit until the disposition of the appeal by the Supreme Court of the United States.

Dated January 22, 1921.

WALTER H. SANBORN,
U. S. Circuit Judge,
Eighth Circuit.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 22, 1921.

(*Bond on Appeal to Supreme Court U. S.*)

Know all men by these presents that we, The Wichita Railroad and Light Company, as principal, and United States Fidelity & Guaranty Company of Baltimore, Maryland, as surety, are held and firmly bound unto the State of Kansas and to the Kansas Gas and Electric Company in the sum of Five Hundred ($500.00) Dollars lawful money of the United States to be paid to them, to which payment well and truly to be made we bind ourselves and each
145 of us jointly and separately.

Signed and dated this 22nd day of January, A. D. 1921.

Whereas, the above named appellee has prosecuted an appeal to the Supreme Court of the United States to reverse the judgment of the Circuit Court of Appeals of the United States for the Eighth Circuit in the above entitled cause:

Now, therefore, the condition of this obligation is such that, if the above named appellee shall prosecute its said appeal to effect and answer all costs if it fails to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

THE WICHITA RAILROAD AND LIGHT COMPANY,
By HENRY I. GREEN,
Attorney in Fact, Principal.

[SEAL.] UNITED STATES FIDELITY & GUARANTY COMPANY,
By JULIAN JACKSON,
Attorney in Fact.

Approved:

WALTER H. SANBORN,
Circuit Judge.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 24. 1921.

146 United States Circuit Court of Appeals, Eighth Circuit.

No. 5529.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS et al., Appellants,

vs.

THE WICHITA RAILROAD AND LIGHT COMPANY, Appellee.

Appeal from the District Court of the United States for the District of Kansas.

Citation on Appeal.

UNITED STATES OF AMERICA, *ss:*

To The Public Utilities Commission of the State of Kansas and The Kansas Gas and Electric Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, D. C., within thirty days from and after the date hereof, pursuant to an order allowing an appeal, filed in the Clerk's office of the United States Circuit Court of Appeals for the Eighth Circuit, wherein The Wichita Railroad and Light Company, a corporation, is Appellant and you are Appellees, to show cause, if any there be, why the decree rendered against the said appellant as in said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Walter H. Sanborn, United States Circuit Judge in and for the Eighth Circuit, this 22nd day of January, A. D. 1921.

WALTER H. SANBORN,
United States Circuit Judge
for the Eighth Circuit.

146*a* I hereby acknowledge service of the within citation this — day of January, 1921.

H. S. JACKSON,
Attorney for the Public Utilities
Commission of the State of Kansas.
H. L. McCUNE,
Attorneys for The Kansas Gas and
Electric Company.

[Endorsed:] No. 5529. United States Circuit Court of Appeals, Eighth Circuit. The Public Utilities Commission of the State of Kansas et al., appellants, vs. The Wichita Railroad and Light Com-

pany, appellee. Citation on Appeal to Supreme Court U. S., with acknowledgment of service. Filed Jan. 22, 1921. E. E. Koch, clerk.

147 *(Clerk's Certificate.)*

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Kansas as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States in a certain cause in said Circuit Court of Appeals, wherein The Public Utilities Commission of the State of Kansas, et al., were Appellants, and The Wichita Railroad and Light Company, was Appellee, No. 5529, as full, true and complete as the original of the same remain on file and of record in my office.

I do further certify that the original citation with acceptance of service endorsed thereon is hereto attached and herewith returned.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this fourth day of February, A. D. 1921.

[Seal of United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
Clerk of the United States
Circuit Court of Appeals
for the Eighth Circuit.

Endorsed on cover: File No. 28,079. U. S. Circuit Court Appeals, 8th Circuit. Term No. 722. The Wichita Railroad & Light Company, appellant, vs. The Public Utilities Commission of the State of Kansas et al. Filed February 7th, 1921. File No. 28,079.

FILED
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No. 222. 27

In the Supreme Court of the United States

October Term, [illegible] 1922

THE WICHITA RAILROAD AND LIGHT COMPANY, *Appellant,*

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS and KANSAS GAS AND ELECTRIC COMPANY, *Appellees.*

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

APPELLEES' MOTION TO DISMISS OR AFFIRM AND BRIEF OF ARGUMENT IN SUPPORT THEREOF.

A. E. HELM,
Counsel for The Public Utilities Commission of the State of Kansas, Appellee.

H. L. MCCUNE,
Counsel for Kansas Gas and Electric Company, Appellee.

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In the Supreme Court of the United States

October Term, 1921.

THE WICHITA RAILROAD AND LIGHT COMPANY,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS and KANSAS GAS AND ELECTRIC COMPANY, *Appellees.*

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

MOTION TO DISMISS OR TO AFFIRM.

Now come the appellees by their counsel appearing in their behalf and move the court to dismiss the appeal in the above entitled cause for want of jurisdiction for the following reason:

1. The decision of the United States Circuit Court of Appeals in this case was final. It was final because the jurisdiction of the District Court depended entirely upon diversity of citizenship, a conclusion which follows from these premises:

(a) The grounds of the United States District Court's jurisdiction averred in appellant's bill of complaint are limited to diversity of citizenship and the fact that the controversy involved in excess of three thousand dollars.

(b) The allegation in the bill of complaint that the action of the Public Service Commission of Kansas in changing existing rates was violative of Section 10, Article 1, of the Constitution of the United States, is not real or substantial, this court having decided that question adversely to appellant's contention prior to the date of the allowance of the appeal herein.

(c) The references in the bill of complaint to the provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States present no real or substantial dispute as to the effect or construction of said Amendments.

(d) The decisions in the District Court and in the Circuit Court of Appeals did not involve or depend upon any constitutional or Federal question.

And the said appellees by counsel as aforesaid also move the court to affirm said judgment or decree from which said appeal purports to have been taken because from an examination of the record it is manifest that the appeal is taken for delay only and that the questions upon which it is claimed that the jurisdiction depends are so frivolous as not to need further argument.

A. E. HELM,
Counsel for the Public Utilities Commission of the State of Kansas, Appellee.

H. L. MCCUNE,
Counsel for Kansas Gas and Electric Company, Appellee.

No. ~~732~~.217

In the Supreme Court of the United States

October Term, 1921.

THE WICHITA RAILROAD AND LIGHT COMPANY,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS and KANSAS GAS AND ELECTRIC COMPANY, *Appellees.*

APPELLEES' BRIEF OF ARGUMENT UPON MOTION TO DISMISS OR AFFIRM.

I.

STATEMENT.

Appellant, The Wichita Railroad and Light Company, filed its bill of complaint in the District Court of the United States for the District of Kansas, April 24, 1918, by which it sought to enjoin an order of the Public Utilities Commis-

sion of Kansas, which had authorized an increase in rates to consumers of electric energy supplied by Kansas Gas and Electric Company. Thereafter appellee The Public Utilities Commission filed answer, and appellee Kansas Gas and Electric Company, by leave of court, an intervening petition. On March 5, 1919, appellant filed its motion for the entry of a final judgment and decree upon the pleadings and the cause was thereupon submitted to the court.

The District Court rendered judgment on the pleadings enjoining said order. Upon appeal the Circuit Court of Appeals for the Eighth Circuit reversed and remanded the cause with instructions to the trial court to dismiss the bill of complaint. Thereafter appellant prosecuted its appeal from the judgment and decree of the Circuit Court of Appeals.

Appellees, the Public Utilities Commission of the State of Kansas and Kansas Gas and Electric Company, have filed in this court a motion to dismiss or affirm the appeal because the decree and judgment of the Circuit Court of Appeals was final and this court is without jurisdiction to review the cause upon appeal. Said motion appears in full preceding this brief of argument. It is contended that the judgment of the Circuit Court of Appeals was final because the District Court's jurisdiction was dependent entirely upon diversity of citizenship.

II.

ARGUMENT.

Section 128 of the Judicial Code provides that the judgments and the decrees of the Circuit Courts of Appeal shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being citizens of different states, with certain exceptions which for the purposes of this case need not be noticed.

This court in applying Section 128 of the Judicial Code has declared:

> "Where the jurisdiction of the circuit court is invoked on the ground of diverse citizenship it will not be held to rest also on the ground that the suit arose under the Constitution of the United States, unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution, upon the determination of which the result depends, and which appears on the record by a statement in legal and logical form, such as good pleading requires; and where the case is not brought within this rule the decree of the circuit court of appeals is final."

Empire State-Idaho Mining Company v. *Hanley*, 198 U. S. 292, 49 L. ed. 1056, 25 Sup. Ct. Rep. 691.

Arbuckle v. *Blackburn*, 191 U. S. 405, 48 L. ed. 239, 24 Sup. Ct. Rep. 148.

Western Union Telegraph Company v. *Ann Arbor Railroad Company*, 178 U. S. 238, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867.

Spencer v. *Duplan Silk Company*, 191 U. S. 526, 48 L. ed. 287, 24 Sup. Ct. Rep. 174.

Shulthis v. *McDougal*, 225 U. S. 561, 56 L. ed. 1205, 34 Sup. Ct. Rep. 704.

Roman Catholic Church v. *Pennsylvania Railroad Company*, 237 U. S. 575, 59 L. ed. 1119, 35 Sup. Ct. Rep. 729.

The converse of the rule just quoted is likewise well settled. Therefore, the sole ultimate question upon this motion is whether the instant case does or does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution of the United States. An examination of the bill of complaint and those parts of the record to which attention will be invited should persuade that the appeal should be dismissed under authority of the decisions hereinabove cited. The conclusion that the jurisdiction of the trial court depended entirely upon diversity of citizenship follows from the premises to be now discussed.

(a) The grounds of the United States District Court's jurisdiction averred in appellant's bill of complaint are limited to diversity of citizenship and the fact that the controversy involved in excess of three thousand dollars. (Record, p. 2.)

The opening paragraph of the bill of complaint avers that plaintiff therein, appellant here, the Wichita Railroad and Light Company, is a citizen of West Virginia. The second paragraph avers that the Public Utilities Commission of the

State of Kansas is a creature of the Legislature of Kansas and that its members are citizens of that state. And the third paragraph avers that the controversy involves in excess of three thousand dollars exclusive of interest and costs. There is not in the bill of complaint any statement or averment that the controversy arises under or involves in any way the construction or effect of the Constitution of the United States. Beginning with the fourth paragraph of the bill of complaint, appellant stated its alleged cause of action.

Equity Rule No. 25 requires that a bill in equity shall contain, among other things, "a short and plain statement of the grounds upon which the court's jurisdiction depends." In compliance with that rule appellant stated that the District Court's jurisdiction depended upon diversity of citizenship of the parties and the suit's involving more than three thousand dollars. Failure to include in the statement of the grounds of jurisdiction that the effect or construction of the Constitution was involved should be taken as indicative at least that no such question was substantially and really involved.

(b) The allegation in the bill of complaint that the action of the Public Service Commission of Kansas in changing existing rates was violative of Section 10, Article 1, of the Constitution of the United States, is not real or substantial, this court having decided that question adversely to appellant's contention prior to the date of the allowance of the appeal herein.

That a statute granting to a state commission authority to make rates to be charged by public service companies was not unconstitutional as being a delegation of legislative power was decided long ago in *Reagan* v. *Farmers Loan & Trust Company*, 154 U. S. 362, 38 L. ed. 1014, 14 Sup. Ct. Rep. 1047, and has been ever since adhered to.

Long prior to the institution of this case, and ever since, this court has declared that Article 1, Section 10, of the Constitution of the United States does not forbid rates fixed by contract with a public service company from being superseded by rates fixed by a properly constituted and acting state public service commission. *Manigault* v. *Springs*, 199 U. S. 473, 480, 50 L. ed. 274, 278, 26 Sup. Ct. Rep. 127; *Louisville & N. R. Co.* v. *Mottley*, 219 U. S. 467, 482, 55 L. ed. 297, 303, 31 Sup. Ct. Rep. 265; *Chicago, B. & Q. R. Co.* v. *McGuire*, 219 U. S. 567, 55 L. ed. 338, 31 Sup. Ct. Rep. 259; *Atlantic Coast Line R. Co.* v. *Goldsboro*, 232 U. S. 548, 558, 58 L. ed. 721, 726, 34 Sup. Ct. Rep. 364; *Rail & River Coal Company* v. *Ohio Industrial Commission*, 236 U. S. 338, 349, 59 L. ed. 597, 615, 35 Sup. Ct. Rep. 359; *Union Dry Goods Company* v. *Georgia Public Service Corporation*, 248 U. S. 372, 63 L. ed. 309, 39 Sup. Ct. Rep. 117; *Kansas City Bolt & Nut Company* v. *Kansas City Light & Power Company*, 252 U. S. 571, 64 L. ed. 721, 40 Sup. Ct. Rep. 392.

In *G. & C. Merriam Company* v. *Syndicate Publishing Company*, 237 U. S. 618, 59 L. ed. 1148, 35 Sup. Ct. Rep. 708, it was said:

> "The circuit court of appeals' decree, affirming the decree of the district court, was final unless, in addition to the allegations of diverse citizenship which were contained in the bill, there was an averment of a cause of action and consequent basis of jurisdiction arising under the Constitution or statutes of the United States. *Macfadden* v. *United States*, 213 U. S. 288, 53 L. ed. 801, 29 Sup Ct. Rep. 490; *Shulthis* v. *McDougal*, 225 U. S. 561, 56 L. ed. 1205, 32 Sup. Ct. Rep. 704. If the jurisdiction of the District Court was invoked on the ground of diversity of citizenship and the averment as to a right arising under the Federal Constitution or statutes was unsubstantial and without real merit, either because of its frivolous character upon its face or from the fact that reliance was based upon a claim of Federal or statutory right denied by former adjudication of this court, then the appeal to this court must be dismissed. *Newburyport Water Company* v. *Newburyport*, 193 U. S. 561, 576, 48 L. ed. 795, 799, 24 U. S. Sup. Ct. Rep. 553; *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 311, 47 L. ed. 190, 192, 23 Sup. Ct. Rep. 123."

And in *Brolan* v. *United States*, 236 U. S. 216, 59 L. ed. 544, 35 Sup. Ct. Rep. 285, the late lamented Chief Justice, speaking for the court, said:

> "Our jurisdiction to directly review depends upon the constitutional question, since

> the other matters relied upon are, as a general rule, within the exclusive jurisdiction of the circuit court of appeals of the ninth circuit, although, if power to review attaches to the case because of the constitutional question, that authority gives rise to the duty to determine all the questions involved * * *. Under these circumstances to prevent a disregard of the distribution of appellate power made by the Judicial Code, and to see to it that there is something on which our jurisdiction to review can rest, it behooves us in this, as in all other cases, to see whether the question upon which our power depends is really presented, and if not, because, although in form arising, it is in substance so wholly wanting in merit as to be frivolous, to decline the exercise of jurisdiction. * * * Coming to that subject, the entire absence of all ground for the assertion that there was a want of power in Congress for any reason to adopt the provision in question *is so conclusively foreclosed by previous decisions as to leave no room for doubt as to the wholly unsubstantial and frivolous character of the constitutional question based upon such contention* * * *." (Italics ours.)

It results from the foregoing that the allegations in the bill of complaint attacking the power and authority of the Public Utilities Commission of Kansas to change existing rates of public service companies present no real or substantial dispute as to the effect or construction of Section 10, Article 1, of the Constitution, for the reason that such contention has been expressly denied by former adjudications of this court. If the complaint

was that the power was improperly exercised there is no room for application of that section of the Constitution.

(c) The references in the bill of complaint to the provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States present no real or substantial dispute as to the effect or construction of said amendments.

References to the 5th and 14th Amendments to the Constitution of the United States may be considered together inasmuch as, insofar as the present status of this case is concerned, all the rights guaranteed by the 5th Amendment are protected by the 14th Amendment and the reasons to be urged in support of the contention that the effect or construction of the former Amendment was not really and substantially involved in the instant case, are equally applicable to the same contention with respect to the latter Amendment.

It remains to examine those portions of the bill of complaint touching the Amendments in question and to test the substance thereof. These are the pertinent paragraphs. (Transcript of Record, pp. 4-5):

> "Third. Plaintiff further alleges that the added charges fixed by the order of the Public Utilities Commission dated March 25, 1918, Exhibit 'A' hereof, are preferential and discriminatory in that the rates and charges and added rates and surcharges are discriminatory against the plaintiff herein and against every large consumer of electricity and penalize the large consumer of electricity and particularly the plaintiff herein, which is

the heaviest consumer of electricity in the city of Wichita or on the lines of The Kansas Gas and Electric Company, and that such discrimination against the plaintiff and the rates fixed upon a scale increasing as the volume of consumption increases is in violation of every correct principle of rate making, in violation of the laws of the State of Kansas, under which said defendant commission is acting, and is discriminatory under both the State and Federal law, is the taking of the plaintiff's property without due process of law and the violation of Article 5 of the Amendments to the Constitution of the United States and of Article 14 of the Amendments to the Constitution of the United States and a denial of the equal protection of the law, in violation of the 14th Amendment to the Constitution of the United States; that by reason thereof, the order made by said Public Utilities Commission of the State of Kansas is discriminatory, nugatory and void and should be enjoined and set aside as hereinafter prayed.

Fourth. Plaintiff further alleges that said order of the defendant, The Public Utilities Commission of the State of Kansas, made on the 25th day of March, 1918, and the classification of consumers and the schedule of rates or added surcharges fixed therein are unlawful, unreasonable and discriminatory; that by reason thereof, the charges fixed against this plaintiff are unreasonably high and are confiscatory, and result in the taking of the property of the plaintiff without due process of law and deny to the plaintiff the equal protection of the law, in violation of the provisions of the Federal Constitution herein above referred to, and in violation of the laws of the State of Kansas and of every true principle of rate making. * * *"

Invoking the rule hereinabove quoted from *Empire State-Idaho M. Co.* v. *Hanley, supra,* appellees urge that a dispute or controversy as to the effect or construction of the Constitution does not appear on the record by a statement in legal and logical form such as good pleading requires and that as a result thereof jurisdiction of the District Court will not be held to rest also on the ground that the suit arose under the Constitution appellant having invoked that jurisdiction on the ground of diverse citizenship. The quoted portion of the bill of complaint represents an apparent effort to embody in the bill a "catch-all" allegation that is without color or substance. It complains that the order of the Commission violated principles of rate making, the statutes and laws of Kansas, and the Constitution of the United States and such matters are written without any semblance of clearness or particular application to the order in question.

But if the bill were taken to have sufficiently stated that the case involved a dispute and controversy as to the effect or construction of one of the Amendments to the Constitution, **the result of the suit did not and was never intended to depend upon the determination of any such question.** That fact clearly appears from admissions contained in appellant's motion for judgment on the pleadings.

By its motion for judgment on the pleadings (Transcript of Record, pp. 30-32) appellant moved the trial court for the entry of a final judgment and decree upon the pleadings which consisted of

the bill of complaint, the answer of The Public Service Commission, the intervening petition of appellee, Kansas Gas and Electric Company, and a stipulation and motion, the latter now irrelevant. The state of the pleadings upon the filing of appellant's motion was such that it stood admitted that the citizenship of the parties and the amount involved conferred jurisdiction upon the District Court; that the appellant and appellee Kansas Gas and Electric Company were public service companies between which there had been a contract fixing rates to be charged for electric energy; that The Public Service Commission of Kansas was such a body as its name implies and that upon application of appellee Kansas Gas and Electric Company, the appellee The Public Utilities Commission had entered the order complained of after a hearing participated in by appellant by which order the Commission found and ordered that until further order the appellee Kansas Gas and Electric Company should be permitted and authorized to add certain surcharges to its existing rates for electricity supplied to its consumers in the state of Kansas. It was also admitted that the terms, form and substance of the order were undisputed and as set out in the pleadings. It was denied that the added surcharge was unreasonable, discriminatory or confiscatory.

In that state of the pleadings the appellant moved, as already stated, for the entry of a final judgment and decree upon the pleadings. Summarizing the state of the record appellant in that motion said:

"Wherefore, plaintiff shows that the diversity of citizenship between the parties to this cause being admitted, and the amount of controversy being admitted to exceed three thousand dollars, exclusive of interest and costs, and it being admitted in this case that the final and determining issue is the binding effect upon this plaintiff of said order of said Commission as above set forth, and it appearing from an inspection of said order that the same is wholly void, insufficient, invalid and without binding effect, the necessity for extended hearing, and the introduction of voluminous, tedious and complicated evidence and proof is wholly unnecessary under the state of the pleadings in this cause of record appearing in this court, and in presenting its motion, plaintiff saves and reserves to itself all of its rights in the presentation of evidence and proofs and hearing upon the merits of the issues of fact and law, otherwise than as above stated involved in this cause, in the event it should be determined that final judgment and decree should not be entered pursuant to this motion and a similar motion herein filed by plaintiff against the defendant, The Public Service Commission of the State of Kansas." (Transcript of Record, p. 31.)

(It may be observed at this point that the Circuit Court of Appeals held in effect that appellant's attempted reservation embodied in the preceding quotation, was ineffective in view of the submission of the cause to the trial court upon the motion for final judgment and the admissions contained therein.)

It, therefore, appears the appellant counted upon the alleged patent invalidity of the order which it sought to enjoin and upon the alleged want of power and authority in the Commission to supersede contract rates and that the question of jurisdiction was treated by appellant as depending entirely upon diverse citizenship and the effect of Section 1, Article 10 of the Constitution (which had been settled by previous adjudications) to the total exclusion of any question of the effect or construction of the 5th or 14th Amendments. The alleged patent invalidity was based upon the order's failure to contain recitations of the Commission's findings of fact—a question involving only the construction of the Kansas statutes creating the Commission which could not under any view afford a basis of Federal jurisdiction. It has never been claimed there was anything on the face of the order or admitted by the pleadings which brought said order in conflict with either the 5th or 14th Amendments.

Clearly appellant did not intend and did not urge that the result be made to depend upon the effect or construction of either the 5th or 14th Amendments, and it should be held to have conceded that its references to those Amendments presented no real and substantial question of the kind necessary to deprive the judgment of the Circuit Court of Appeals of the finality which it would otherwise have.

(d) The decisions in the District Court and in the Circuit Court of Appeals did not involve or depend upon any constitutional or Federal question.

The trial court held that the order of The Public Utilities Commission of Kansas was void because there was not included in it a recitation of the findings of fact upon which to rest the jurisdiction and order of the Commission. The Circuit Court of Appeals for the Eighth Circuit held that the Kansas statutes creating the Commission and prescribing its powers and duties did not require such findings to be set out in the order. Both courts held against appellant's contention that a public service company's contract could not, without violating the Constitution, be superseded by the order of the Commission. This latter holding was under authority of *Union Dry Goods Company* v. *Georgia Public Service Corporation*, 248 U. S. 372; 63 Law Edition 309; 39 Sup. Ct. Rep. 117, and the earlier cases dealing with the same subject matter.

A casual examination of the opinions in both lower courts will convince that their decisions did not touch upon or involve the effect or construction of either the 5th or 14th Amendments and that appellant did not pursue in either of said courts its casual reference in the bill of complaint to the Amendments in question. All of which points to the fact that such references were unsubstantial and wholly ineffectual to confer jurisdiction upon the trial court but for the fact that

they were accompanied by proper and requisite allegations of diverse citizenship. The judgment and decree of the Circuit Court of Appeals was, therefore, final.

For all of the foregoing reasons it is urged that the appeal herein should be dismissed for want of jurisdiction. As an alternative it is urged that the alleged constitutional questions which it is claimed give the right to appeal from the judgment and decree of the Circuit Court of Appeals are so frivolous as not to need further argument, and that if not dismissed the judgment and decree should be affirmed.

A. E. HELM,
Counsel for the Public Utilities Commission of the State of Kansas, Appellee.

H. L. MCCUNE,
Counsel for Kansas Gas and Electric Company, Appellee.

No. ~~722~~. 717

In the Supreme Court of the United States

October Term, 1921.

THE WICHITA RAILROAD AND LIGHT COMPANY, *Appellant*,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS and KANSAS GAS AND ELECTRIC COMPANY, *Appellees*.

NOTICE.

To Messrs. Henry I. Green, Thomas F. Doran and Harris & Harris, Counsel for Appellant.

Please take notice that on Monday, the 30th day of January, 1922, at the opening of the court, or as soon thereafter as may be, the motion of which the foregoing is a copy will be submitted to the Supreme Court of the United States for a decision of said court thereon.

Herewith is a copy of the brief of argument to be submitted with the said motion in support thereof.

A. E. HELM,
Counsel for the Public Utilities Commission of the State of Kansas, Appellee.

H. L. MCCUNE,
Counsel for Kansas Gas and Electric Company, Appellee.

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No. 27

In the Supreme Court of the United States

October Term, A. D. 1922

Wichita Railroad and Light Company,
Appellant
vs.
Public Utilities Commission of the State of Kansas, and Kansas Gas and Electric Company,
Appellees

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

REPLY OF APPELLANT TO THE MOTION OF APPELLEES TO DISMISS OR TO AFFIRM

HENRY I. GREEN
THOMAS F. DOBAN
Counsel for Wichita Railroad & Light Company, Appellant.

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No. 217

In the Supreme Court of the United States

October Term, A. D. 1921

Wichita Railroad and Light Company, *Appellant* vs. Public Utilities Commission of the State of Kansas, and Kansas Gas and Electric Company, *Appellees*	Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

REPLY OF APPELLANT TO THE MOTION OF APPELLEES TO DISMISS OR TO AFFIRM

Comes now the appellant by its counsel and presents the following reply and brief of argument in support thereof, in answer to the motion of the appellees to dismiss the appeal herein, or in the alternative, to affirm the decree appealed from.

Henry L. Gray

Thomas F. Doran

Counsel for Wichita Railroad & Light Company, Appellant.

is so strongly relied upon by counsel for appellees, that it is *only where the public health, safety, good order, comfort, or general welfare so requires and demands,* that a state can lawfully and constitutionally abrogate an existing contract; and then *only when the power is appropriately exercised, under proper and sufficient pleadings, proof, determination, and findings* in the proceedings before the commission sitting as an *administrative* tribunal.

The true question involved in this direct (not collateral) attack on the commission's order is whether or not an administrative tribunal acting under authority derived wholly from a state law, can legally abrogate a contract entered into long prior to the creation of the state regulating tribunal, the public utilities commission, upon a record which affirmatively shows,

(1) That no sufficient petition was ever filed with the state commission referring in any way to an existing contract, and no reference is found concerning such contract either in the pleadings before the commission or the order entered by it;

(2) That the statute from which the state commission derives its powers and jurisdiction, specifically requires a finding by the commission that an existing contract is unreasonable, excessive or discriminatory, *before* the commission can rightfully claim to possess any jurisdiction to abrogate or annul such contract; and no such finding is made by the commission.

> (See Secs. 13, 14 and 16 of the Kansas Public Utilities Act, cited at pages 50 to 54 of "brief on behalf of appellant" heretofore filed by us with this court in this cause).

(3) That the tribunal whose order is claimed to abrogate an existing contract, possesses under the laws of the state only administrative powers and does not possess either legislative or judicial power.

(4) That the order of the commission which it is claimed operates to abrogate the existing con-

tract, contains no findings of fact necessary as a condition precedent to clothe the commission with power or authority to enter any order which by any proper construction can be said to annul or abrogate any existing contract; and

(5) That under the police power, the commission was without jurisdiction *in the particular case* to enter any valid order affecting an existing contract.

A further and important question presented to this court is whether or not the Circuit Court of Appeals in reversing a decree of the district court which was entered upon an interlocutory motion, can deprive the litigant which was successful in the district court, but unsuccessful in the circuit court of appeals, from having a trial upon the merits of the cause of action presented by the bill of complaint.

In this case counsel for appellees advance the proposition that any state may by statute, give to an administrative tribunal which the state legislature creates, the power from the mere caprice or whim of such administrative tribunal, to abrogate and annul the terms and provisions of any contract fixing and prescribing rates and conditions for furnishing electric power; that such administrative tribunal may, by a general blanket order, set aside, abrogate and annul all contracts, the provisions of which conflict with such order, and may do this without the issue being presented to the administrative tribunal by any pleading or averment whatsoever; and also that the order entered by such administrative tribunal shall be binding as against the terms and provisions of a written contract, without any averment, finding or conclusion that the public interest so requires, or even that the public interest is involved or affected by the terms and provisions of the contract so abrogated and annuled.

Counsel for appellees contend that because this court has held that a state has the power to abrogate

contracts fixing rates to be charged by a public utility, this precludes any inquiry into the methods or procedure employed by the state in abrogating such contracts.

In other words, appellees' counsel contend that it is not necessary that there be an averment or claim by the petitioner seeking to abrogate a contract, nor any finding or determination by the State Utility Commission, that the public interest is in any way affected by the terms of the contract, nor that the terms of the contract are unreasonable or unremunerative to the petitioner; they contend that when a public utility commission enters an order abrogating a contract rate, the parties to the contract are foreclosed from any judicial inquiry by the federal courts either as to the jurisdiction of the commission to enter such an order, or as to the legality of the order under the due process clauses of the federal constitution; and they also contend that when one of the parties to such contract seeks to protect itself against the enforcement of such an order of an administrative tribunal, under its constitutional rights as guaranteed by Section X of Article 1, and by the Fourteenth amendment to the federal constitution, no issue is presented sufficient to give the Federal Courts jurisdiction of the controversy.

Appellees' counsel charge in their motion to dismiss or affirm, that an issue and controversy of the character above set forth, is not real or substantial, but is frivolous.

Yet the record in this case shows that in the courts below, three separate opinions have been written by three different judges, two of which reach the conclusion that the order of the commission to enjoin the enforcement of which the bill of complaint was filed, was and is absolutely void on the face of the record as disclosed by the pleadings; and the third opinion merely finds that there is not sufficient appearing upon the face of the record to show that the order is void. And it so happens that the fourth judge who has considered

the case in the courts below, joins in the particular opinion which finds the record sufficient to sustain the order; thereby putting upon the Street Railway Company, appellant herein, the burden of taking the appeal from such majority opinion, although in point of numbers, the able jurists who have considered this case in the District Court and Circuit Court of Appeals, have tipped the scales of justice to an even balance.

We assume that the important portions of the record in this case necessary to be considered on this motion, are:—

FIRST:—The bill of complaint filed in the District Court which contains as a part thereof three important exhibits, namely, the petition filed by appellees with the Public Utilities Commission of Kansas, the contract between appellant and the Kansas Gas & Electric Company, and the order entered by the commission, the enforcement of which the appellant by its bill of complaint seeks to enjoin; which exhibits are by specific reference made a part of the bill of complaint. (Trans. of Rec. pages 2 to 20, inclusive);

SECOND:—The opinion of the District Court granting to the plaintiff, appellant herein, the relief prayed in its bill of complaint. (Trans. of Rec. pages 32 to 44, inclusive).

THIRD:—The opinion of the Circuit Court of Appeals reversing, by a divided court, the decree of the District Court. The majority opinion appearing in the transcript of the record pages 53 to 60, and the dissenting opinion of Circuit Judge Sanborn appearing at pages 61-62.

We believe that an examination of the portions of the record just indicated will convince your honors that the issues presented on this appeal are of far-reaching importance, and furnish to this court an initial opportunity to define and limit the powers and prerogatives of state administrative tribunals, who

are daily assuming jurisdiction to arbitrarily interfere with the private property rights of citizens, and confiscate private property, in defiance of the protection presumed to obtain under the due process clauses of the Federal Constitution.

In other words, the record here presents a case where a public utilities commission acting under state law, has attempted to exercise an arbitrary power which neither an executive, a legislature, nor a court possesses. The executive, legislative and judicial agencies of the state are bound to act within the limits of the police power; while in the instant case the Kansas Public Utilities Commission has assumed the right to act arbitrarily, and in disregard of the limitations of the police power.

The bill of complaint (including the exhibits thereto) filed by appellant in the District Court for the District of Kansas, First Division, appears pages 2 to 20, inclusive, of the transcript of the record filed herein.

In addition to the allegations of the bill showing diversity of citizenship of the different parties to the suit, (which allegations were made solely to show that the venue lay in the District of Kansas, First Division, and which were not claimed by the bill of complaint as any ground of federal jurisdiction,) it is clearly and distinctly charged that the suit is filed by the appellant to protect its rights under certain provisions of the Federal Constitution.

A brief reference to these allegations will disclose that the substantive questions involved in the merits of the case present a controversy arising under the Federal Constitution. The decision of the case involves a construction and application of the provisions of Section X, Article 1 and of the 14th Amendment to the Constitution of the United States as applied to the

facts set forth by the averments of the bill of complaint.

The bill of complaint alleges:—

1. That the plaintiff, appellant herein, entered into a written contract with the Kansas Gas & Electric Company in the year 1910, which by its terms continues until the year 1930, for the purchase by appellant of electric current from the Kansas Gas & Electric Company; a true copy of the contract is attached to and made a part of the bill of complaint as Exhibit B thereof. (Transcript of Record pages 8-17).

2. That on January 22, 1918, the Kansas Gas & Electric Company filed with the Kansas Public Utilities Commission, its so-called "application to add a surcharge to certain of its rates for electricity"; and a copy of this so-called application is attached to and made a part of the bill of complaint as Exhibit C thereof. (Transcript of Record pages 18-20).

3. That notice of the filing of the application aforesaid having been given to the plaintiff, appellant, it had objected to the jurisdiction of the Kansas Public Utilities Commission over the plaintiff, and protested and objected to that administrative tribunal assuming any jurisdiction under said application to change or modify the written contract between the appellant and appellee, Kansas Gas & Electric Company.

4. That notwithstanding the objections of the plaintiff to the jurisdiction of the Kansas Public Utilities Commission, that administrative tribunal had "without jurisdiction or warrant of law", made and entered as of March 25, 1918, its pretended order purporting to grant to the Kansas Gas & Electric Company, appellee, the right to add surcharges to certain of its existing rates, including the contract rates in question but in no way referring to such contract rates; and a copy of the said order of the Commission is attached to, and made a part of the bill of complaint as Exhibit A thereof. (Trans. of Rec. pages 6-8).

5. That the order of the Kansas Public Utilities

Commission purporting to give the Kansas Gas & Electric Company authority to add the said surcharges, is as to the plaintiff, appellant herein, nugatory and void, and the enforcement thereof as to the contract rates under the contract between the plaintiff and the appellee, Kansas Gas & Electric Company, should be enjoined and set aside, and the order be held and declared void and of no effect; and the bill of complaint specifically charges:—

(a) That the Kansas Public Utilities Commission was without jurisdiction or authority to hear or determine any question relative to the plaintiff, appellant, or its business, rules, regulations, or rates, for the reason that it conducts its business wholly within the City of Wichita, and is not subject to control or regulation by the Kansas Public Utilities Commission. (This, by virtue of a specific provision of the Kansas Statute, which has not been argued on this appeal).

(b) That said commission was and is without power and authority to change and modify the written contract fixing the rates, rules, regulations and conditions upon and under which the Kansas Gas & Electric Company delivers electric current to the plaintiff; and with respect to this allegation, the bill of complaint sets forth with particularity, the infirmities of the so-called application of the Kansas Gas & Electric Company filed with the commission.

The bill alleges that if the Kansas Gas & Electric Company is not receiving sufficient revenues from its business, its failure in that respect is not due to the contract between the plaintiff herein and the said gas and electric company nor the rates and charges fixed in said contract; that the rates and charges fixed in the contract are reasonable and just and remunerative and not preferential or discriminatory, *and places no undue burden on the other customers of the Kansas Gas & Electric Company, or upon the public.*

The bill alleges that the Kansas Gas & Electric Company is enabled to sell current to its other customers and to the public at a less rate than it would

otherwise be compelled to charge them, were it not for the fact that the plaintiff is furnished a large amount of current at particular hours of the day under the terms and conditions of the contract for the purchase and use by it of current from said Kansas Gas & Electric Company.

The bill of complaint charges that the regulation and change of the rates fixed in this written contract are not within the police power of the State of Kansas under an application of the character that had been filed by the gas and electric company with the Public Utilities Commission of the State of Kansas. It is specifically charged in the bill of complaint that said contract is within the protection of Section 10 of Article 1 of the Constitution of the United States which forbids any state to pass any law impairing the obligation of contracts.

The bill of complaint therefore shows that the jurisdiction of the federal court is invoked because by no appropriate pleading, finding or order, has it been shown that any public interest requires or justifies any change in the terms of said written contract, and that in fact *no public interest was involved* in the subject matter of the proceeding before the Public Utilities Commission.

The bill of complaint further charges that if in the character of proceeding in which the order in question had been entered by the Kansas Public Utilities Commission, the law creating the commission and defining and prescribing its duties and obligations is construed to be made applicable to the contract in question, then such law is repugnant to the provisions of the Federal Constitution and therefore null and void, and that the order promulgated by said Commission attempting to abrogate said contract, is nugatory and void and the enforcement thereof should be enjoined.

(c) That the rates and charges and added rates and surcharges attempted to be fixed by the Public Utilities Commission in said order (Exhibit A to the

bill of complaint), are preferential and discriminatory against the plaintiff and against every large consumer of electricity and penalizes the large consumers of electricity and particularly the plaintiff, which is the heaviest consumer of electricity in the City of Wichita or on the lines of the appellee, Kansas Gas & Electric Co., and that such discrimination against the plaintiff and the fixing of rates upon a plan increasing as the volume of consumption increases, violates every correct principle of rate making, violates the laws of the state of Kansas under which the defendant Commission is acting, and that said order is discriminatory under both the state and federal law.

The bill of complaint specifically avers that the order in question if enforced, would take the plaintiff's property without due process of law in violation of Article XIV of the amendments to the Constitution of the United States and is a denial to the plaintiff of the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States; that therefore the order is nugatory and void.

(d) That the order of the defendant, Public Utilities Commission of the State of Kansas, entered March 25, 1918, and the classification of consumers and the schedule of rates and added surcharges fixed therein, are unlawful, unreasonable and discriminatory; and that by reason thereof the charges fixed against the plaintiff are unreasonably high, *and are confiscatory and result in the taking of the property of the plaintiff without due process of law, and deny to the plaintiff the equal protection of the law in violation of the provisions of the Federal Constitution herein above referred to.*

The bill of complaint thereupon prays that the order of the Public Utilities Commission of the State of Kansas made and filed on March 25, 1918, be declared discriminatory, excessive, unreasonable, confiscatory and void, in violation of the laws of the State of Kansas and of the United States.

It is clear therefore that the bill of complaint invoked the jurisdiction of the federal court on the ground:—

FIRST, That the plaintiff was threatened with having its property taken without due process of law;

SECOND, That without any allegation or claim of any public interest authorizing it so to do, an administrative tribunal of the State of Kansas, acting under pretended authority of a statute of that state, had attempted to abrogate and annul the terms and provisions of a solemn and binding contract between the plaintiff and the Kansas Gas & Electric Company; and

THIRD, That said administrative tribunal had entered an order which placed an excessive and unreasonable burden upon the plaintiff and discriminated against it by attempting to fix rates in violation of the existing contract, and that the rates so prescribed by said Commission order are not only different from rates prescribed for other customers of the gas and electric company, but are fixed on a different basis, and are especially discriminatory against the plaintiff.

In this connection it is important to note that the plaintiff was the only customer in the class to which the high surcharge rates were made applicable, and that out of approximately 19,900 consumers served by the Kansas Gas & Electric Co., more than 19,000 of them were entirely exempted from the payment of any proposed surcharge whatever; less than 50 of the entire number of consumers were by the order required to pay any added surcharge to their existing rates. This on its face discloses the unwarranted discrimination against the plaintiff. The mere statement of the fact proves that the plaintiff was by the order sought to be denied its right to equal protection of the law.

This brief reference to the issues raised by the bill of complaint shows that the federal jurisdiction was invoked on other grounds than diversity of citizenship of the two original parties to the suit; and the three opinions rendered by the lower courts in

this case show that the real merits of the case involve questions arising under the Constitution of the United States.

The District Court held the order void on its face (Trans. of Rec. p. 43),

> "(1) Because there is neither found nor stated in said order any reason, ground or justification for annulling and abrogating the contract between the parties, valid when made and in full force, effect and operation when the Public Utilities Commission came into existence as a creature of the State;
>
> (2) For the reason that no facts are found or stated in the order of the Commission sustaining or tending to sustain the exercise of its statutory powers and functions as prescribed in the public utilities act; and further no finding of the reasonableness or unreasonableness of the contract rates existing between the parties is made, and no finding is made showing or tending to show any discrimination between the contract rates and other rates of charge for service charged other members of the public, or other justification or excuse for the making of the order except the mere caprice or whim of the Commission based on the ground that the net revenues of intervener will be temporarily decreased if certain other changes in rates shall in the future be made by the Commission.

The provisions of the Kansas Statutes prescribing the conditions upon which the Utilities Commission has any jurisdiction to fix rates are quoted at page 50 et seq. of our original briefs filed herein.

The dissenting opinion of presiding Judge Sanborn in the Circuit Court of Appeals, (Trans. of Rec. p. 61), declares that the order should be held void because the petition which had been filed by the Kansas Gas & Electric Company, appellee, with the Kansas

Public Utilities Commission, was not sufficient to confer jurisdiction upon that tribunal to modify or abrogate the contract between the plaintiff and the Kansas Gas & Electric Company for furnishing the electric power which was the subject matter of the contract.

Judge Sanborn points out tersely but clearly, wherein the petition which had been filed with the Public Utilities Commission was not sufficient to confer jurisdiction on that tribunal to enter any order abrogating the contract in question.

In his dissenting opinion, Judge Sanborn concludes:

> "The petition (filed with the Kansas Commission by the appellee gas & electric company), does not show what profits the gas & electric company derived from the contract rates during the years prior to 1917. It does not show that the contract rates have been or will be confiscatory. It does not show that the welfare of the public demands the increase, and in my opinion it states no facts or case within the jurisdiction of the Commission; its order was made without jurisdiction and is void.'

In Railroad Commission v. Worthington, 225 U. S. 101, 56 L. Ed. 1004, this court said:—

> "An examination of the bill in this case, which was filed under the authority of the circuit court, shows that the order of the commission was attacked, not only upon the ground that its findings were alleged to be unsupported by the testimony and to have been made upon improper consideration of the facts, but also because the order affected and interfered with interstate commerce, in which the complainant was engaged and over which the Railroad Commission of Ohio had no authority because of the commerce clause of the Federal Constitution. *It further was alleged that the owners of the property con-*

stituting the receivership estate would be deprived thereof without due process of law; that they would be denied the equal protection of the laws, and that their property would be taken without compensation. It thus appears that jurisdiction was invoked, not only because the present case is ancillary to the receivership suit which depended upon diverse citizenship, but upon grounds which involve alleged infractions of the Federal Constitution and rights secured thereby. The case was therefore one which might have been taken to the circuit court of appeals, and the fact that it involved grounds which might have warranted a direct appeal to this court did not deprive the circuit court of appeals of jurisdiction"

"The question, then, is: Is this one of the cases made final in the circuit court of appeals by the act creating that court? The 6th section of that act provides that the judgment of the circuit court of appeals 'shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states; also, in all cases arising under the patent laws, under the revenue laws, and under the criminal laws, and in admiralty cases'. In all other cases there is a right of review by this court if the matter in controversy exceeds $1,000. It is averred in the bill and admitted in the answer that the amount in dispute exceeds in value the sum of $5,000. The case is therefore one not made final in the circuit court of appeals, and the appeal to this court was properly allowed."

In this case the bill charges and the answers admit that the amount in controversy exceeds $1000.00.

In Henningsen v. United States Fidelity & Guaranty Co. et al, 208 U. S. 404; 52 L. Ed. 547.

this court said:—

> "A motion is made to dismiss on the ground that the jurisdiction of the circuit court was invoked solely on the ground of the diversity of citizenship of the parties, and hence the decree of the circuit court of appeals was final. The motion must be overruled. Diversity of citizenship was, it is true, alleged in the bills, but grounds of suit and relief were also based on the statutes of the United States as from the discussion of the merits will be seen. Those statutes entered as elements into the decision of the circuit court of appeals and were necessary elements."

In F. C. & P. R. R. Co. v. Bell, et al., 176 U. S. 321, 44 L. Ed. 486, the rule was announced in the following language:

> "As, then, the plaintiffs in the circuit court claimed in their declaration that the controversy was one that turned on a construction of the laws of the United States, *and as both the courts below dealt with the case on that assumption,* it is plain that it can not be successfully contended in this court that the judgment of the circuit court of appeals was final because the jurisdiction of the circuit court was dependent entirely upon the opposite parties being citizens of different states."

In Northern P. R. Co. v. Soderberg, 188 U. S. 526, 47 L. Ed. 575,

a motion was made to dismiss the appeal for the reason assigned that the jurisdiction of the Circuit Court was invoked upon grounds of diverse citizenship, and therefore the decree of the circuit court of appeals was final. In disposing of the motion, this court used the following language:—

> "But to impress the attribute of finalty upon a judgment of the circuit court of appeals,

> it must appear that the original jurisdiction of the circuit court was dependent 'entirely' upon diverse citizenship. That is not the case here. Plaintiff's bill does, indeed, set up a diversity of citizenship as one ground of jurisdiction, but, as it appears that its title rests upon a proper interpretation of the land grant act of 1864 as to the exception of nonmineral lands, there is another ground wholly independent of citizenship under that clause of Section 1 of the act of 1888 clothing the circuit court with jurisdiction of all civil suits involving over $2000, 'and arising under the constitution or laws of the United States'. If the case made by the plaintiff be one which depends upon the proper construction of an act of Congress, with the contingency of being sustained by one construction and defeated by another, it is one arising under the laws of the United States."

Realizing that this is not a question with the disposition of which this court is unfamiliar, we deem the citation of numerous authorities unwelcome.

This court has consistently held that it will look to the averments of the bill of complaint to determine whether or not the case there presented is one which involves the construction or application of the constitution or laws of the United States as the basis of jurisdiction in the Federal courts. If it is disclosed upon an inspection of the bill of complaint that the case is one involving the construction or application of any of the provisions of the Federal Constitution, then in such case the judgment or decree of the Circuit Court of Appeals is not final, and may be reviewed on further appeal to this court.

It is clear that the bill in this case was filed by the plaintiff to secure to itself the protection afforded by the specific provisions of the Constitution of the United States, which the bill of complaint charged were about to be violated by the enforcement of the order of the Kansas Public Utilities Commission purporting to abrogate and annul the existing contract between the plaintiff and the Kansas Gas & Electric Company.

It is unnecessary to argue to this court that if the order of the Kansas Public Utilities Commission was entered without jurisdiction or was void on its face for the reasons assigned by the district court in the opinion rendered by Judge Pollock, or that the effect of the order, if enforced, would deprive the plaintiff of its contractual rights—then in either of such events, there was a want of due process of law to sustain the order of the Commission.

In addition also, we earnestly contend that the plaintiff was entitled, in any event, to a trial upon the merits of the allegations in its bill of complaint that the enforcement of the order would confiscate the property of the plaintiff contrary to the protection afforded by the federal constitution.

The majority opinion appealed from entirely deprived the plaintiff of any right to a trial upon the merits. It attempted to dispose of the whole case in the decision of an interlocutory motion.

The allegations of the bill of complaint that the plaintiff was about to have its property confiscated, clearly presented a federal question sufficient to confer jurisdiction on the district court, and is a complete answer to the claim that no federal question was involved. Therefore, under the settled law, the plaintiff is entitled to appeal to this court from the decision of the circuit court of appeals.

At all times it must be borne in mind there is no right of appeal provided by the Kansas Statute from the orders of the Public Utilities Commission; they can only be reviewed by the commencement of an original proceeding, which is a direct attack upon the validity of the commission order.

This is therefore a direct (not collateral) attack on the order of the Public Utilities Commission.

A brief reference to the authorities cited by counsel for appellees in support of their motion to dismiss or affirm, may prove helpful.

The first case cited by appellees counsel in support of their position, is

> Empire State Idaho Mining Co. v. Hanley, 198 U. S. 292, 49 L. Ed. 1056.

In that case the court points out in the opinion that,

> "The Constitution and laws of the United States were not mentioned in the complaint nor any dispute or controversy raised as to the effect or construction of the Constitution or laws on the determination of which the result depended; nor was any title, right, privilege or immunity specially set up or claimed under Constitution or law".

Of course in that case this court was without appellate jurisdiction.

The next case they cite is

> Arbuckle v. Blackburn, 191 U. S. 405; 48 L. Ed. 239.

Chief Justice Fuller, after repeating the rule governing appellate jurisdiction in this character of case, said:

> "The averments of this bill did not bring the case within that rule, for they put forward no existing controversy as to the effect or construction of the Constitution, on which the relief depended, and set up no right which might be defeated or sustained according to such construction."

Chief Justice Fuller concludes the opinion with this language:

> "Whatever grounds of equity interposition may have existed here, and we express no opinion on that subject, the jurisdiction of the circuit court as a court of the Unied States depended alone on diverse citizenship. *If the allegation of that fact had been omitted from the bill, the jurisdiction could not have been maintained.*"

They next cite

> Western Union Telegraph Co. v. Ann Arbor R. Co. 178 U. S. 238; 44 L. Ed. 1052.

In that case the only language used in the bill of complaint, as pointed out by this court in the opinion, from which any inference could be drawn that any law of the United States was involved, was the general allegation that under the provisions of the statutes of the United States the Telegraph Company had the right to maintain its telegraph lines on the right of way of the defendant railroad company. It was in no way alleged that the basis of the cause of action was any alleged violation of any law of the United States, nor that it involved the construction or application of the constitution or any federal statute.

They next cite

> Spencer v. Duplan Silk Co., 191 U. S. 526; 48 L. Ed. 287.

In the opinion in that case we find this language:

> "The plaintiff, in her complaint, did not claim any right under the Constitution and laws of the United States, or in any way mention or refer to those laws; and, at the trial, she relied wholly upon a right given by the common law, and maintained her action upon

> such right only. It was the defendant, and not the plaintiff, who invoked the Constitution of the United States. This, as necessarily follows from the foregoing considerations, and as was expressly adjudged in Colorado Central Consol. Mining Co. v. Turck, 150 U. S. 138, 37 L. Ed. 1030, is not sufficient to support the jurisdiction of this court to review by appeal or writ of error the judgment of the Circuit Court of Appeals."

The rule being that this court will look to the bill of complaint and not to the answer or pleas of the defendant to determine whether a federal question was involved, of course the court could do nothing else in that case but dismiss the appeal.

The next case they cite is

> Shulthis v. McDougal, 225 U. S. 561; 56 L. Ed. 1205.

In that case it was sought to confer appellate jurisdiction in this court because the case involved the title to lands which had been acquired under federal law. In disposing of the motion challenging the appellate jurisdiction of this court, Mr. Justice Van Devanter tersely and clearly applies the rule as follows:

> "But the bill makes no mention of those statutes or of any controversy respecting their validity, construction, or effect. Neither does it by necessary implication point to such a controversy. True, it contains enough to indicate that those statutes constitute the source of the complainant's title or right, and also shows that the defendants are in some way claiming the land, and particularly the oil and gas, adversely to him; but beyond this the nature of the controversy is left unstated and uncertain. Of course, it could have arisen in different ways, wholly independent of the source from which his title or right was derived *So, looking only to the bill, as we have seen that we must, it cannot be held that the case as therein stated was one arising under the statutes mentioned.*"

The last case cited by Appellees' counsel in support of their motion, is

> Roman Catholic Church vs. Pennsylvania Railroad Co. 237 U. S. 575; 59 L. Ed. 1119.

In that case there were some vague references to the Constitution of the United States without attempting to designate any section or article or amendment or sentence of the Federal Constitution, nor how they were in any way involved in the controversy.

This court speaking through Mr. Chief Justice White, held that

> "As from any point of view it is impossible, because of the vagueness of these averments, to escape, to say the least, doubt as to whether the bill asserted rights under the Constitution and laws of the United States which would be adequate to sustain the jurisdiction of the circuit court if the allegations of diversity of citizenship were stricken out, it follows that they are not sufficient to sustain the claim of jurisdiction."

We therefore insist that it is clear, when the authorities cited by counsel for appellees to sustain their motion to dismiss, are examined and applied to the state of the record under the allegations of the bill of complaint or declaration in the particular case, they can not be said to be authority in this case.

In the case at bar, the averments of the bill positively and amply assert the claims of the plaintiff, appellant herein, to the protection of specific provisions of the Federal Constitution,—in the plaintiff's effort to avoid confiscation of its property and prevent the obligation of its contract being impaired. It has even been denied a hearing upon the merits in this proceeding where no issue was presented as to any public interest authorizing even an investigation as to the reasonableness of the terms and provisions of the contract between the two utilities, parties to the suit.

We believe that upon the consideration of this case by this court, a most timely opportunity will be afforded for judicial expression defining and announcing the limitations upon the arbitrary powers and prerogatives which are now being asserted and exercised by these public utility commissions in their interference with private property and contractual rights; and also to check their unwillingness or inability from lack of understanding, or indifference to property rights, to follow the law of the land and observe the constitutional mandates forbidding them as agents of the state to deprive citizens of their property without due process of law.

Respectfully submitted,

Henry L. Green

Thomas F. Doran

Counsel for Wichita Railroad & Light Co., Appellant.

United States Supreme Court
FILED
DEC 8 1922
WM. R. STANSBURY
Clerk

No. 727

In the Supreme Court of the United States

October Term, 1922

THE WICHITA RAILROAD AND LIGHT COMPANY,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS, ET AL., *Appellees.*

Appeal from the United States Circuit Court of Appeals for the Eighth District.

BRIEF ON BEHALF OF APPELLANT.

HENRY I. GREEN,
THOMAS F. DORAN,
HARRIS & HARRIS,
Solicitors for Wichita Railroad & Light Co., Appellant.

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No. 722.

In the Supreme Court of the United States

October Term, 1920.

THE WICHITA RAILROAD AND LIGHT COMPANY, *Appellant*,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS, ET AL., *Appellees*.

Appeal from the United States Circuit Court of Appeals for the Eighth District.

BRIEF ON BEHALF OF APPELLANT.

STATEMENT.

This suit was brought on April 24, 1918, by appellant to prevent the enforcement against it of the following order of the Public Utilities Commission of the State of Kansas:

(Its) "Docket No. 2344.

In the Matter of the Application of the Kansas Gas and Electric Company for Permis-

sion to Add a Surcharge to certain of Its Rates for Electricity.

Be it remembered that on this 25th day of March, A. D. 1918, the matter of the application of the Kansas Gas and Electric Company for permission to add a surcharge to certain of its rates for electricity, came duly on for order by the Commission upon the pleadings of the respective parties and the evidence introduced thereunder; and the Commission, upon consideration of said pleadings and evidence, finds that the Kansas Gas and Electric Company should be authorized and permitted to add to its existing rates for electricity supplied by it to consumers in the State of Kansas, until the further order of the Commission, the following net surcharge:

For the first 100 KWH per month no surcharge.

For the next 14,900 KWH per month 1 mill surcharge per KWH.

For the next 20,000 KWH per month 2 mills surcharge per KWH.

For all excess over 35,000 KWH per month 3 mills surcharge per KWH.

The Commission further finds that, until its further order herein, each substation of the Arkansas Valley Interurban Railway Company should not be considered as a separate unit but that monthly bills should be rendered and collected for the aggregate of all current delivered by the Kansas Gas and Electric Company to the Arkansas Valley Interurban Railway Company considered and treated as one customer, and not for each sub-station separately.

It is therefore by the Commission considered and ordered: That the Kansas Gas and Electric Company be, and it hereby is, auth-

orized and permitted to add to its existing rates for electricity supplied by it to consumers in the State of Kansas, until the further order of the Commission, the following net surcharge:

For the first 100 KWH per month no surcharge.

For the next 14,900 KWH per month 1 mill surcharge per KWH.

For the next 20,000 KWH per month 2 mills surcharge per KWH.

For all excess over 35,000 KWH per month 3 mills surcharge per KWH.

It is further by the Commission considered and ordered: That until its further order herein, each substation of the Arkansas Valley Interurban Railway Company shall not be considered as a separate unit, but that monthly bills shall be rendered and collected for the aggregate of all current delivered by the Kansas Gas and Electric Company to the Arkansas Valley Interurban Railway Company considered and treated as one customer, and not for each substation separately.

By order of the Commission.

CARL W. MOORE, *Secretary.*

O. K.

JOSEPH L. BRISTOW,
JOHN M. KINKEL,
C. F. FOLEY,
Commissioners."

(Transcript of Record, pages 7-8.)

The above order of the Kansas Public Utilities Commission could be reviewed only by the commencement of an original action in a court of competent jurisdiction. *No statutory appeal from*

the Commission's order is allowed under the laws of Kansas.

The method of *direct* review of the order is prescribed by Section 21 of the Kansas Public Utilities Commission Act as follows:

> "Section 21. *Any* * * * *public utility* governed by the provisions of this act, *or other party in interest, being dissatisfied with any order of the commission* fixing any rate, * * * fare, charge or finding, rules or regulations, * * * schedules, or any order or ruling fixing any regulations, practices or service * * * *may, within thirty days from the making of such order, commence an action in a court of competent jurisdiction, against the public utilities commission as defendant, to vacate and set aside any such order*, finding or decision of the public utilities commission *on the ground that the* * * * *rate*, fare, charges, orders, rules, regulations, *findings*, classifications or schedules in such decisions *are unlawful or unreasonable*, or that any such regulation * * * practice or service fixed in such order or decision is unreasonable. All actions brought under this section shall have precedence in any court, and, on motion, shall be advanced over any civil cause of a different nature pending in such court, *and such action shall be tried and determined as other civil actions.* * * * During the pendency of any action under the provisions of this act, all orders made by the public utilities commission prescribing rates, * * * fares, charges, rules, regulations, classifications or schedules or findings, shall, unless temporarily stayed or enjoined remain in full force and effect until final judgment is

rendered therein. * * * Service of summons on any member of the Board shall be sufficient service on the Board."

We emphasize the fact that this is therefore a *direct* attack, and not a collateral attack, upon the order in question, because the opinion of the court from which this appeal is prosecuted manifestly discloses that the case was viewed in that court as a collateral attack upon the Commission's order; yet the plain language of the Kansas Statute specifically prescribes the procedure followed in this case as the only method of direct attack as by appeal or review of the order in controversy.

The bill of complaint was filed by appellant in the District Court of the United States for the District of Kansas, first division, Judge Pollock presiding.

The District Court entered a decree declaring the said order of the Commission void.

Appeal was prosecuted by the appellees herein, Kansas Public Utilities Commission and the Kansas Gas and Electric Company, from the decree of the District Court, to the Circuit Court of Appeals, Eighth Circuit. The Circuit Court of Appeals, by a divided court, reversed the decree of the District Court and remanded the cause, *with directions to dismiss the complaint.*

Presiding Judge Sanborn of the Circuit Court of Appeals dissented from his colleagues Judges Trieber and Carland.

The case therefore comes to this court with the opinion of two judges of the courts below

that the foregoing order is void, and the opinion of two judges who constituted the majority of the appellate tribunal, holding the order valid.

The opinion of the District Court is printed in full in the record in this case, pages 32 to 42.

The opinion of the Circuit Court of Appeals, together with the opinion by Justice Sanborn, which clearly states the reasons for his dissent, appear in the record, pages 53 to 62.

The scope of the issues in this case, and the law applicable thereto, can be most readily grasped by reading these opinions.

We specifically cite the pages of the record where they may be found, realizing that this court will first read the opinions of the lower courts in this case, and thus best understand the issues and law involved. To further aid the court, we present in chronological order the facts which underlie this litigation.

Appellant, Wichita Railroad and Light Company (which is usually referred to as the "Street Railway Company"), is a corporation organized under the laws of the State of West Virginia, licensed to do business in the State of Kansas.

The Public Utilities Commission of the State of Kansas, sole defendant in the original bill of complaint, is a creature of the Kansas statute and an administrative agent of that state.

The Kansas Gas and Electric Company (sometimes referred to as the "Electric Company" or "Power Company") is also a corporation organized outside of the State of Kansas, but licensed to do business in that state. It became a party

to this cause by filing its intervening petition, asking to be made a party defendant.

On May 2, 1910, the Electric Company, being then engaged in the manufacture and sale of electric current for light, heat and power purposes, entered into a contract with the Street Railway Company, appellant, which contract appears in the record, pages 8 to 17.

This contract provided for the sale by the Electric Company (appellee) to the Street Railway Company (appellant) of electric power to operate a street railway system in the city of Wichita. The term of the contract was from May 2, 1910, to 12 o'clock midnight November 30, 1930. The contract specifically provides the rate to be paid by the Street Railway Company for the power furnished to and consumed by it under this contract *for the entire period.*

In the year 1911 the present statute creating the Public Utilities Commission of the State of Kansas was passed, and the Commission was organized, and on the 4th day of May, 1914, the Electric Company filed with the Commission, as required by law, its schedule of rates to general consumers of electricity, as the same were then in force, but this schedule of rates in no way affected or attempted to change the contract rate of appellant. The rate for the power furnished appellant for the operation of said street railway system was the rate specified in the contract between these two corporations above referred to, and which all parties admit has never been modified or changed, except by the attempted enforcement of the Commission's order involved in this cause.

On January 22, 1918, the Electric Company filed with the Kansas Public Utilities Commission an application for permission to add a surcharge to certain of its rates for electricity in Kansas. This application appears in the record, pages 18 to 20.

The grounds alleged in the petition as a basis of the application to add surcharges to its rates by the Electric Company were:

(a) That the rates to which the applicant asked to apply such surcharge

> "Were filed with the Commission on or about the 4th day of May, 1914; that said rates were based upon the cost of producing and distributing electrical energy at said time, and were intended to and did yield to your petitioner a reasonable return only upon the value of its property used and usable in producing and distributing such electrical energy in the state of Kansas," and
>
> "Your petitioner represents that since the date of the filing of said schedules of rates the cost to your petitioner of producing and distributing such electrical energy has *increased enormously on account principally of the increased cost of fuel and of labor, resulting in a large measure from the unusual conditions which exist throughout the country, due to the fact that the nation is engaged in war.*" (Tr. 18.)

(b) (Tr., 19.) That the Electric Company had reduced its rates for residential and commercial lighting by filing new schedules with the Commission in December, 1916, and had promised to

further reduce residential and commercial lighting rates; that such reductions would materially decrease the earnings of the Electric Company, and that the Commission should therefore make an order authorizing the applicant to establish the surcharges proposed.

(c) That the cost of fuel had materially increased and therefore the Electric Company should be allowed to add the proposed surcharges to its rates for electric energy furnished to large power consumers.

No reference is made in the application of the Electric Company to appellant's contract rates.

The surcharges *asked by the petition* decreased as the quantity of current used per month by the individual consumers increased. That is, the Electric Company asked authority to add surcharges as follows:

> For the first 100 KWH per month, no surcharge.
>
> For the next 1000 KWH per month, 12 mills net per KWH.
>
> For the next 10,000 KWH per month, 9.5 mills net per KWH.
>
> For the next 1,000,000 KWH per month, 8 mills net per KWH.
>
> For all excess KWH per month, 3.5 mills net per KWH.

The petition alleged that the Electric Company had 19,900 consumers, and that 17,000 of these consumers would not be affected by the surcharges for the reason that they used less than 100 KWH

per month; and that the last step in said surcharge schedule affected only six consumers, and the last two steps therein affected only thirty-eight consumers.

The Street Railway Company (appellant) was the largest consumer among the Electric Company's patrons.

On the 25th day of March, 1918, the Commission entered its order in the language above recited, over the signatures of Joseph L. Bristow, John M. Kinkel and C. F. Foley. (Record, p. 7.)

It will be observed that this order finds no fact whatever except that in the opinion of the Commission the Electric Company should be authorized and permitted to add to its existing rates for electricity the following net surcharges:

> For the first 100 KWH, no surcharge.
> For the next 14,900 KWH, 1 mill surcharge per KWH.
> For the next 20,000 KWH, 2 mills surcharge per KWH.
> For all excess over 35,000 KWH, 3 mills surcharge per KWH.

The Commission then ordered that the Electric Company be authorized and permitted to add said surcharges to its existing rates.

The surcharge rates prescribed by this order of the Commission are exactly the reverse in principle of those prayed by the Electric Company in its application to the Commission. The Electric Company asked that the surcharges be less as the quantity used by the consumer increased; while the

Commission's order directs that the surcharge be higher as the quantity used by the consumer increased.

It is patent, therefore, that the order of the Commission violates the fundamental principle of rate making that the rate should decrease as the quantity used increases. At the outset of this statement we have set out *haec verba* the entire order of the Commission from the caption to the signatures. It contained no other finding or language than that quoted above.

The Commission's order contained no finding that the rates with these surcharges added were reasonable or just; it contained no finding that the existing rates which the order sought to abrogate were unreasonable, unjust, preferential or discriminatory; it contained no finding of fact by the Commission as to why any surcharge should be authorized. The order shows an entire absence of any claim or finding or conclusion by the Commission that any conditions prevailed or existed which gave them any authority to fix or prescribe any rate whatever.

We will later herein present to this court the specific provisions of the Kansas statute which prescribe the authority and jurisdiction of the Commission, and lay down in definite and certain language the only conditions under which the Commission could assert or exercise any jurisdiction to fix rates for a public utility.

This order being entered by the Commission, without any of the above necessary findings, the Electric Company, nevertheless, claimed its right

to add these surcharges to the rates fixed by the contract then existing between it and the appellant.

The appellant denies the right of the Electric Company under such an order to abrogate and annul the contractual obligation wherein the rates to be paid for electric current were definitely agreed upon and prescribed for a twenty-year term.

Section 21 of the Kansas Public Utilities Act, creating the Public Utilities Commission, provides that:

> "Any * * * public utility * * * or other party in interest, dissatisfied with any order of the Commission fixing any * * * rate, joint rate, fare, charge or findings, rules or regulations, classifications, schedules * * * may, within thirty days after the making of such order, commence an action in a court of competent jurisdiction, against the Public Utilities Commission as defendant, to vacate and set aside any such order, finding or decision of the Public Utilities Commission on the ground that the * * * rate, joint rate, fare, charges, orders, rules, regulations, findings, classifications or schedules in such decisions are unlawful or unreasonable."

Apparently the Circuit Court of Appeals failed to take cognizance of the fact that the bill in this case was filed pursuant to said Section 21 of the Kansas Public Utilities Act, providing for the commencement of an action in any court of competent jurisdiction to question the legality or reasonableness of an order of the Commission. They reversed the case and remanded it, with directions to dismiss the complaint. This ignores

the right of the appellant to a trial upon the merits, which it has never had in this case; and this will be separately discussed later herein.

Pursuant to the above provision of the Kansas statute, the appellant filed its bill in the District Court for the District of Kansas, First Division, setting forth the contract between appellant and the Electric Company, and the entry of the order by the Kansas Commission, which, if enforced, operates to abrogate the terms of that contract and impair the obligation thereof. The bill specifically challenges the jurisdiction and power of the Commission by an order of this character to change or modify the written contract between appellant and the Electric Company fixing, for the term of twenty years, the rates, rules and conditions upon which appellant was and is purchasing its electric current to operate its street railway.

The bill also alleged that the order of the Commission was unreasonable and prayed that the same be declared discriminatory, excessive, confiscatory and void. The bill prayed an injunction restraining the enforcement of the order.

Temporary injunction was issued by the District Court as prayed in the bill.

In the first instance the Public Utilities Commission did not appear or answer the bill.

However, the Kansas Gas and Electric Company (appellee) presented its petition to the District Court for leave to intervene; leave was granted and the Electric Company filed its intervening petition setting forth in substance that it was the beneficiary of the order of the Utilities Commis-

sion, and prayed that the District Court dissolve the temporary injunction, and

> "That the said order of the Public Utilities Commission of March 25th, 1918, be declared in all respects a valid and lawful order, and that the intervener be authorized and permitted to enforce the same against the plaintiff, and recover from the plaintiff the amount due the intervener on account of said surcharge for the electrical energy furnished, and for such other and further relief as to the court may deem equitable and just." (Record, p. 25.)

This intervening petition of the Electric Company was filed in this cause on February 7, 1919.

Later, and on the 14th day of May, 1919, the Kansas Public Utilities Commission filed an answer, which is simply a general denial of the material averments of the bill of complaint. (Tr. of Rec., p. 27.)

The execution and existence of the contract between the appellant and the Electric Company, the entry of the order of the Kansas Public Utilities Commission, the language and contents of the original application of the Electric Company for authority of the Utilities Commission to add the surcharges to its rates, and, in fact, all of the facts above recited, being admitted by the pleadings and by stipulation of the parties, and appearing on the face of the record in this cause, the appellant herein filed in the District Court its motion for judgment on the pleadings.

This motion for judgment appears in the record, pages 28 to 30.

The District Court heard arguments and considered briefs filed by counsel for the respective parties on this motion for judgment, and under the admitted facts appearing on the face of the record, rendered the opinion above referred to (Tr. of Rec., pp. 32-42), holding the order of the Commission void upon its face under the admitted facts set forth in the pleadings, and the injunction was made perpetual.

There was no trial of the cause upon the merits in the District Court, but the case was decided in the District Court on the interlocutory motion for judgment on the pleadings.

Upon appeal being prosecuted by the Electric Company and the Kansas Public Utilities Commission to the Circuit Court of Appeals as above stated, a majority of that court held that the motion for judgment on the face of the pleadings should not have been allowed. However, the case was not remanded for trial upon the merits, but was remanded with directions to dismiss the bill of complaint. (Tr. of Rec. 95.)

We especially direct the attention of this court to the dissenting opinion of the Honorable Walter H. Sanborn, presiding judge of the Circuit Court of Appeals (Tr. of Rec. 61, 62), wherein he points out that the order of the Commission was void for the reason that there was nothing in the application of the Electric Company filed with the Commission which could confer jurisdiction on the Commission to change the contract rate between

appellant and the Electric Company. He specifically says (Tr. of Rec. 62):

> *"It does not show that the welfare of the public demands the increase, and in my opinion it states no facts or case within the jurisdiction of the Commission, its order was made without jurisdiction and it is void."*

SPECIFICATION OF ERRORS AND GROUNDS FOR REVERSAL.

The appellant contends that the opinion and decree of the Circuit Court of Appeals, as set forth in the opinion filed by two of the three judges constituting that court, is erroneous and should be reversed on the following grounds and for the following reasons:

1. The petition of the Kansas Gas & Electric Company, filed with the Public Utilities Commission of the State of Kansas, pursuant to which the order of that Commission of March 25, 1918, was entered, was insufficient and did not state necessary facts to confer upon that Commission jurisdiction to enter an order increasing the rates fixed by the contract between said Gas & Electric Company, petitioner, and this appellant.

2. The court erred in holding that to enter a valid order it was not necessary that the Public Utilities Commission find any facts necessary to give the Commission jurisdiction of the particular case in which the order was entered.

3. The court erred in holding that the Public Utilities Commission of the State of Kansas could enter a valid order abrogating the contract between appellant and the Electric Company, appellee, without any reference being made or consideration given, either in the pleadings or the order of the Commission, to the fact that the petitioner was seeking to abrogate and annul the contract

then existing between the appellant and petitioner, Kansas Gas & Electric Company.

4. The court erred in assuming that the Kansas Public Utilities Commission "must have found" allegations in the petition of the Gas & Electric Company to be true, in the absence of any findings of facts whatever being made or recited in the Commission's order.

5. The court erred in holding that it is wholly immaterial that the Commission made no special findings of fact in support of the order in question, granting the relief afforded by the establishment of a new schedule of rates different from those fixed by the 20-year contract between appellant and the electric company.

6. The court erred in holding that the Kansas Public Utilities Commission could lawfully set aside and abrogate the existing contract between appellant and the electric company, without any allegation, consideration or finding that said contract in the respects impaired or abrogated was either unjust, unreasonable, unfair, unjustly discriminatory or preferential, or that said contract in any way affects the public interest or otherwise falls within the regulatory police powers of the state.

7. The court erred in reversing the judgment and decree of the District Court which had awarded appellant, plaintiff below, a permanent injunction against the enforcement of the order of the Public Utilities Commission, entered March 25, 1918.

8. The court erred in its conclusion that the Kansas Public Utilities Commission order in issue

can be sustained or supported by any of the provisions of Section 20 of the Act of the Kansas legislature creating the Public Utilities Commission of that state, and defining its powers and duties.

9. The court erred in holding that the provisions of the Kansas Statute declaring that the orders of the Public Utilities Commission "shall be *prima facie* reasonable unless or until changed or modified by the Commission or in pursuance of proceedings instituted in court, as provided in this act," obviates the necessity of the Commission making any finding of fact to support the order fixing rates, even though the effect of the order is to abrogate an existing contract.

10 The court erred in remanding this cause, with instructions to the District Court to dismiss the complaint; thereby depriving the appellant of its right to a trial upon the merits on the evidence competent to be considered under the issues presented by the pleadings.

11. The court erred in entering a final order disposing of this entire cause, when the only matter before it, for review, was the record made by the District Court in ruling upon a motion for judgment on the face of the record, and no trial having been had in the District Court upon the merits of the issues presented by the plaintiff's petition and complaint alleging that the order was unreasonable, unjust and its enforcement would result in depriving the plaintiff of its property without due process of law.

12. The court erred in directing the District Court to dismiss appellant's bill of complaint upon the decision of an interlocutory motion, without any opportunity for a trial of the case upon its merits under the other issues raised by the pleadings.

ARGUMENT.

In considering this case, it is first necesary to determine whether the entry of the order in question by the Public Utilities Commission was:

(a) A ministerial act; or

(b) An administrative act; or

(c) A legislative act; or

(d) A judicial act.

It cannot be claimed that the Commission was performing only a ministerial duty, because on its face the order states that there were filed, presented and considered certain "pleadings and evidence introduced thereunder."

Therefore, the Commission acted either in an administrative, legislative or judicial capacity. The theory adopted by the majority opinion of the Circuit Court of Appeals manifestly assumes that the act of the Commission was either legislative or judicial in character. That opinion declares that:

> "The Commission *must have found* the allegations in the gas and electric company's petition for the surcharge, that in the generation of electric energy for large consumers, fuel is approximately 75% of the cost of generation, and that the low rates given to these large consumers, in the schedule then in force, were non-compensatory by reason of the large increase of the cost of coal used for the generation of electricity, and that for this rea-

son there should be a surchage sufficient to allow some profit on the investment from the electricity furnished these large consumers." (Tr. of Rec., p. 58.)

It is only legislative acts that do not require some findings of fact, both jurisdictional and substantive to support their validity.

A legislative body is not required to give any reason or basis for its action. It simply declares the law. If any reason or basis can be found, under any possible state of facts, to support the validity of a legislative provision, it is valid on its face; although it may be declared invalid as applying to some particular state of facts established by judicial inquiry.

For example, the legislature may prescribe the minimum rates of fare to be charged by railroad companies for intrastate travel; the law on its face may be valid; it may be valid as to such railroads as may find the rate fixed by the statute compensatory when applied to the business of that particular road.

However, on judicial inquiry it may be established that the rate is confiscatory when applied to the business of a particular railroad, complainant, and as to that particular railroad, or that particular state of facts, it may be declared invalid on judicial inquiry and determination.

The majority opinion from which this appeal is prosecuted proceeds upon the theory that it was not necessary for the Commission to give any reason or basis for the order in question. If that as-

sumption is correct, then the order in question must be accepted as an attempted legislative act on the part of the Commission.

However, this order cannot stand as a legislative act or provision. This, for the simple reason that all the legislative power of the State of Kansas is by the Constitution of that state

> "vested in a House of Representatives and Senate." Art II, Sec. 1, Kansas State Constitution.

The legislative power vested in the House of Representatives and Senate by the Kansas State Constitution cannot be delegated by the legislature organized pursuant to this constitutional provision of that state.

The general rule is well stated in 6 Ruling Case Law, page 165, Sec. 165, as follows:

> "It is a cardinal principle of legislative government that except when authorized by the constitution, as may be the case in reference to municipal corporations, the legislature cannot delegate the power to make laws to any other authority or body."

This court in *Interstate Commerce Commission* v. *Goodrich*, 224 U. S. 194, p. 215 (56 L. Ed. 729), clearly expressed the rule in the following language:

> "The Congress may not delegate its purely legislative power to a Commission, but, having laid down the general rules of action, under which a Commission shall proceed, it

> may require of that Commission the application of such rules to particular situations and *investigation of facts* with a view to making orders in a particular matter within the rules laid down by Congress."

That the majority opinion of the Circuit Court of Appeals presumes for this order of the State Public Utilites Commission the force, effect and character of a legislative enactment, is obvious when they uphold its validity upon the theory that the Commission "must have found" the necessary facts to exist to support their order and decision.

It is the peculiar prerogative of the legislature to enact laws without assigning any reason, or stating any motive to sustain their judgment or to render their enactments valid.

> "The constitutionality of a law is not to be determined on a question of fact to be ascertained by the court. If under any possible state of facts an Act would be constitutional, the courts are bound to presume that such facts exist."
>
> (6 Ruling Case Law, page 112, sec. 112.)

> "On frequent occasions the constitutionality of a statute depends on the existence or nonexistence of certain facts. In view of the presumption in favor of the validity of Statutes, *it must be supposed* that the legislature had before it when the Statute was passed, any evidence that was required to enable it to act; and if any special finding of fact was needed in order to warrant the passage of a

> particular act, the passage of the act itself is treated as the equivalent of such finding. The validity of legislation which would be necessary or proper under a given state of facts does not depend on the actual existence of the supposed facts. It is enough if the law-making body may rationally believe such facts to be established."
>
> (6 Ruling Case Law, page 111, sec. 111.)

The Circuit Court of Appeals for the Sixth Circuit, in the case of *Grainger* v. *Douglas Park Jockey Club*, reported in the 148th Fed. Rep. 513 (Reported and Annotated in A. & E. Ann. Cas., Vol. 8, p. 997), presents a very full discussion of the authorities bearing upon the question that every presumption will be indulged to support the validity of a legislative enactment, and that the legality or constitutionality of a legislative act does not depend upon the recital of any facts or findings or reason for its enactment. The case of In re Spencer, as reported and annotated in A. & E. Ann. Cas. Vol. 9, p. 1105, is a striking illustration of the application of the rule that

> "the presumption always is that an act of the legislature is constitutional; and when the constitutionality of the act depends upon the existence or non-existence of some fact or state of facts, the determination thereof is primarily for the legislature,"

and that no reason or finding need be assigned by the legislative body to support the validity of its action.

That decision was rendered by the Supreme Court of the State of California, in considering the legality of the Child Labor Act passed by the legislature of that state; and the opinion discloses that the statute was upheld upon the theory that the legislature was presumed to have possession of the necessary information essential to support the validity of the act.

However, any attempt to sustain this order as a legislative act by the Commission must fail, for the reason that legislative power can be exercised only by the legislative body prescribed by the constitution.

The above quotation from Ruling Case Law, Vol. 6, Sec. 165, to the effect that legislative power cannot be delegated is amplified in the same authority, and what amounts to an attempt to delegate such authority is explained in the following language:

> "One of the most important tests as to whether particular laws amount to an invalid delegation of legislative power is found in the completeness of the statute as it appears when it leaves the hands of the legislature. The generally recognized principle is that a law must be so complete in all its terms and provisions when it leaves the legislative branch of the government, that nothing is left to the judgment of the electors or other appointee or delegate of the legislature. *Where a statute is incomplete as legislation and authorizes an executive board to decide what shall and what shall not be deemed an infringement of*

> *the law, it will be held unconstitutional as purporting to make an improper delegation of legislative power."*
>
> (Ruling Case Law, page 166, sec. 166.)

And the authority proceeds to give certain illustrations of statutes held invalid for incompleteness of the acts as passed by the legislative body.

The rule that the functions of the legislature must be exercised by it alone and cannot be delegated, is well stated by the Missouri Supreme Court in the case of *Merchants Exchange* v. *Knott*, 212 Mo. 616, Opinion 641 (111 S. W. 565), where the court says:

> "The power to bind and loose, to inaugurate or suspend the operations of the law, to say where and when it is the law, is of necessity an inherent and integral part of the law-making power, not to be delegated to or wielded by any commission."

The jealousy with which the rule that legislative power cannot be delegated by the legislature to any other tribunal has been emphasized by the Supreme Court of the State of Kansas, in which jurisdiction this cause arises.

The legislature of Kansas at a special session in 1898 passed a law entitled "An Act creating a

Court of Visitation, declaring its jurisdiction and powers, and providing for proceedings and procedure therein." This act, which was designed to regulate rates and practices by railroads and common carriers, was held unconstitutional and void, for the reason that in the powers conferred upon the tribunal sought to be created by the act, legislative, judicial and administrative functions were commingled and interwoven in a manner violative of the constitutional requirement that the three great departments of government should be kept separate and the powers and duties of each exercised independently of the others.

The decision of the Supreme Court of Kansas holding this act unconstitutional in the case of *State of Kansas ex rel. Godard* v. *Johnson et al.*, 61 Kan. 803, also reported in 49 L. R. A. (O. S.) 662, fully discloses that the law as announced by the highest court of that state is in harmony with the general rule that the legislature cannot delegate its powers to any other body, whether a court, board, commission or other tribunal.

The majority opinion of the Circuit Court of Appeals in this case discloses a misconception of the true theory upon which the validity of these statutes to regulate public utilities are sustained as valid or constitutional.

In every court of last resort in the states of the Union, where the validity or constitutionality of these statutes creating boards or commissions to fix rates and regulate public utilities has been sustained, it has been upon the theory that the legislature in announcing by statute the law of the

commonwealth uttered and published a complete and entire legislative provision. It did not attempt to delegate the power to make rates to any rate commission created by the law.

These acts have been sustained in the several states of the Union upon the theory that under the functions of the board or commission or tribunal created by the statute it was charged with the duty of finding and determining whether or not the necessary facts existed to render the law operative in the particular case under consideration.

If the commission finds that the necessary facts exist to bring the case within the operation of the statute, then the terms of the statue apply. Unless the commission finds that the necessary facts exist, then the statute has no operation. The commission itself has no independent discretion to prescribe rates. The legislature must prescribe the rates. The commission under the law finds the facts, whatever they may be, and the law does the rest.

The language used by the Supreme Court of the State of Florida sustaining the validity of an act creating a public utility commission and prescribing its powers and duties, discloses a very clear conception of the true theory of the only valid method of regulating public utilities by general law. The opinion of the Florida Supreme Court sustaining the Public Utilities Commission statute is found in the case of *State of Florida* v. *Atlantic Coast Line Ry. Co.*, 56 Fla. 617, and is also reported in 47 So. Rep. 969, and annotated in L. R. A., Vol. 32 (N. S.), page 639. We quote from

the opinion of Justice Whitfield in this case, the following:

> "If the regulation or action of an official or board authorized by statute does not in effect determine what the law shall be, or does not involve the exercise of primary and independent discretion, but only determines within defined limits, and subject to review, *some fact upon which the law by its own terms operates, such regulation or action is administrative, and not legislative*, executive or judicial in its nature and effect. The effect and operation of a statute may be made conditional or contingent upon the ascertainment of particular facts, and may be made to depend upon a subsequent event. This principle has been applied in regulations relating to public service, occupations, schools, health, elections, safety, food, game, liquor, taxation, and other public purposes.
>
> In a number of well considered cases it has been distinctly held that where a valid statute, complete in itself, enacts the general outlines of a governmental scheme, or policy, or purpose, and confers upon officials charged with the duty of assisting in administering the law authority to make, within designated limitations, and subject to judicial review, rules and regulations, or to *ascertain facts*, upon which the statute by its own terms operates in carrying out the legislative purposes, such authority is not an unconstitutional delegation of legislative power."

In the instant case, however, the court below, in its assumption, ascribes to the Utilities Commission delegated legislative power which it could not legally possess.

That Congress or a state legislature cannot delegate legislative authority or power to any executive official or board of officials is elementary. To do so would be destructive of our whole system and scheme of government.

That the delegation of authority to add to or take from a law would be to delegate legislative power must also be conceded.

> *Coopersville Co-operative Creamery Co.* v. *Lemon*, 163 Fed. Rep. 145 (Circuit Court of Appeals, Sixth Circuit).

But that Congress or a state tribunal may enact a law and delegate the power of finding some fact or state of things upon which the operation of the law is made to depend is equally clear.

The foregoing was the substantial holding of this court in the case of

> *Field* v. *Clark*, 143 U. S. 649, Op. 693; also reported in 36 L. Ed. 294, Op. 310,

in which case this court further says:

> "The proper distinction, the court said, was this (quoting from *In re Locke's App.*, 72 Pa. 491): 'The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or tends to make its own action depend.'"

It is manifest that the order of the Commission cannot be sustained as the exercise of delegated legislative power; and therefore the Commis-

sion either acted in an administrative or judicial capacity.

It is easy to demonstrate that the Commission did not act in a judicial capacity; or if it did, it must be assumed that the court below held it had the right to do so, and under such assumption (though erroneous) its order is void upon its face. If the Commission was attempting to exercise any judicial prerogative, it must observe certain rules governing the procedure of inferior tribunals.

It is elementary that no judgment of a judicial tribunal can be entered except upon the verdict of a jury or a finding of facts.

In courts of general jurisdiction, all the presumptions are in favor of the jurisdiction of the court to enter the judgment, and the existence of the necessary facts to support the relief granted may be implied. But even in such cases the judgment must not upon its face show that it is entered simply because the tribunal in which it is heard finds that the one party or the other ought to have a judgment and that therefore the judgment is entered.

It is a universal rule in the state courts that judgments can only be entered either "upon the finding" or "upon the verdict."

In the Federal courts under the rules promulgated by authority of the acts of Congress, the form of judgments and decrees being generally prescribed, the rule obtains, especially in equity cases, that the findings of the court need not be preserved on the face of the decree or order. However, this rule has no application whatever to proceedings in inferior tribunals.

In proceedings before a tribunal of the character of a public utility commission, exercising special statutory jurisdiction, *nothing is presumed to be within the jurisdiction of the commission*, unless it distinctly appears from the record made by the tribunal in the particular case before it. It must preserve findings of jurisdiction to justify and prove that it has the power and authority to enter any binding judgment, order or decision in any case of which it takes jurisdiction.

In the leading case of *Galpin* v. *Page*, 85 U. S. 350, Opinion 366 (21 L. Ed. 963), this court announced the general rule in the following language:

> "The rule (regarding presumption as to the existence of jurisdictional facts) is different with respect to courts of limited and special authority; as to them there is no presumption of law in favor of their jurisdiction; that must affirmatively appear by sufficient evidence or proper averments in the record, or their judgments *will be deemed void on their face.*"

Quoting from Corpus Juris, Vol. 15, p. 842, Sec. 162:

> "There being no presumption in favor of a court of inferior, limited or special jurisdiction, it is usually considered necessary, in order to sustain the proceedings of such a court, that the record should affirmatively show that the court had jurisdiction."

In re Ramsey v. *Huck et al.*, 184 S. W. 966, Op. 968, the Missouri Supreme Court upon this proposition say:

> "Furthermore, the fact must be borne in mind that County Courts are inferior tribunals, not proceeding according to the course of the common law, but confined to the authority given them by statute, and that the grounds of their jurisdiction must appear affirmatively on the face of their records."

In *Sibley* v. *Waffle*, 2 Smith (N. Y.) 180, Op. 189-190, it was held that even where the order of the surrogate recited that he had acquired jurisdiction by the reading and filing of satisfactory proof, and due publication and due service of the order, but without a recital that the publication and service were at the time and in the manner prescribed by the statute, still this simply amounted to a statement by the surrogate that he, in fact, had acquired jurisdiction, and the court held that "he could not acquire jurisdiction by deciding that he had it," but that this was a matter which must affirmatively appear on the record.

To the same effect is the decision *In re City of Buffalo*, 33 Sickles (N. Y.) 362, Op. 366, where the court held that affirmative proof of compliance with the pre-requisites to obtain jurisdiction was absolutely necessary, *and that these jurisdictional facts could not be presumed or inferred, but must appear on the face of the record.*

In *People* v. *Hynds*, 30 N. Y. 470, it was held that an order entered by two commissioners, with-

out the intervention of a third, or notice to him recited in the order, was absolutely void on its face; and that

> "The order must be sufficient on its face. Its defects cannot be helped out or supplied by parol."

Also in the State of New York in proceedings under the statute relating to the drainage of swamps, in the case entitled *In re* Isaac Marsh, Proceedings under Drainage act, reported in 26 Sickles (N. Y. Appeals) 315, the court says:

> "In such proceedings where the rights of property are sought to be interfered with under the right or color of eminent domain, the facts necessary to give the court or officer jurisdiction must appear in the petition, which alone is to be looked to for the facts upon which jurisdiction depends."

This same general rule is laid down in Bailey on Jurisdiction, Vol. 1, Section 129, at pages 107 and 108, in the following language:

> "With respect to statutory courts, the rule is that when a court is created by the legislature with particular powers expressly conferred, the record of their proceedings must affirmatively show a compliance with the statutory requirements, and that as to such matters favorable presumption will not be indulged in, *and the same rule applies to other tribunals exercising judicial powers, though not strictly courts of justice, such as commis-*

sioners of patents, commissioners of land office, municipal council in respect to proceedings authorized by statute, county commissioners in the exercise of such powers, town authorities in respect to laying out roads or exercising statutory functions.

The decisions of such bodies, are in respect to *collateral* attack, governed by the same rules as the judgments of inferior courts. Thus, an inferior board may determine conclusively its own jurisdiction or power by *adjudicating the existence of facts* upon which its jurisdiction or power depends; but when, however, the power depends not upon the existence or non-existence of matters *in pais* to be established by evidence, but upon allegations in a petition, a portion of the record, the question is not the same. *In such case there must appear in the petition the statutory requisites.*"

In Illinois, the case of *Becklenberg* v. *Becklenberg,* 232 Ill. 120 (83 N. E. 423) a divorce case, the Circuit Court failed to preserve in its decree a finding of fact showing residence for a sufficient length of time of the party complainant within the State of Illinois, to give the court jurisdiction—such residence being necessary under the statute to authorize a complainant to maintain a bill for divorce. Upon *direct appeal* from the Circuit Court, the court of general jurisdiction in Illinois, the Supreme Court reversed the decree because of its failure to contain the *necessary finding of fact* that the complainant had resided within the state a sufficient length of time to entitle her to prosecute her suit.

The principle is announced and applied in *Payson* v. *The People*, 175 Ill. 267 (51 N. E. 588), where the authorities on this subject are collected and discussed; also in *The People* v. *Karr*, 244 Ill. 374 (91 N. E. 485), which involved the jurisdiction of inferior tribunals in drainage proceedings.

Also in Illinois, the Supreme Court in referring to the proceedings of the Public Utilities Commission of that state say, in *Public Utilities Commission* v. *Springfield Gas Company*, 291 Ill. 209 (125 N. E. 891):

> "To enable the courts intelligently to review the order of the commission in a rate-making case the findings of the commission should disclose the ultimate conclusions of the commission as to the specific valuations of the elements considered by it in arriving at the fair present vaue of the property."

And in *Public Utilities Commission* v. *B. & O. S. W. R. R. Co.*, 281 Ill. 405 (118 N. E. 81):

> "There is a reason, however, why the Public Utilities Commission was lacking in jurisdiction to make the order here involved. There was no *complaint or finding* that the rule of appellant was not fairly administered as between different shippers but the *complaint and order* were directed against the rule itself."

The majority opinion of the Circuit Court of Appeals, holding that the Kansas Commission, "when making the order complained of made no special findings of fact is wholly immaterial" of-

fers as the basis of its position the suggestion that there is nothing in the Kansas Statute which requires the Commission to make any finding of fact; and the court cites as authority the case of *Detroit etc. R. R. Co.* v. *Railroad Commission*, 171 Mich. 335, 137 N. W. 329, and quote from that case certain language of the opinion of the Michigan court expressing the unfortunate situation in not having before it a finding by the Michigan Commission distinctly stating the ultimate facts found and the factors considered in determining whether or not the rate was reasonable.

It also happens that the Supreme Court of Kansas in the case of *Union Pacific Railroad Co.* v. *Public Utilities Commission*, 95 Kansas 604, 148 Pac. Rep. 667, expressly cites this same Michigan case (*Detroit & M. Ry. Co.* v. *Michigan Railroad Commission*) in support of exactly the contrary view to that presented by the majority opinion from which this appeal is prosecuted.

In the Michigan case referred to, it is true the language quoted therefrom in the majority opinion in this case was used by the Michigan Supreme Court.

However, it is necessary to understand exactly how the Michigan case arose, and what was before the Michigan Supreme Court when it rendered the opinion, and to consider the specific provisions of the Statute of Michigan with reference to the regulation of public utilities and their schedules of rates.

In the Michigan case complaints had been filed before the railroad commission and orders had

been entered substituting certain freight rates for those being charged by the Detroit & M. Ry. Co. The railway company filed a bill in the Circuit Court on the chancery side against the Public Utilities Commission to vacate these orders. The parties who had filed the complaints before the Commission were allowed to intervene as were also other persons claiming to be interested. Answers were filed *and the court heard evidence additional to that which had been reported by the Commission.* Thereupon, the court referred the whole of the testimony to the Michigan Railroad Commission, and that body made a subsequent report to the court that

> "This defendant, the Michigan Railroad Commission, has carefully considered the testimony in said cause and copy of which was transmitted to it, as aforesaid, *and in addition thereto and in connection therewith,* has made a thorough inspection of all the branch roads of said complainant the Detroit & Mackinac Railway Company, affected by said commission orders, etc."

And the Michigan Railroad Commission further reported to the court that it had carefully considered all the evidence and its own investigations and many facts and circumstances including the character of service required, and the expense incident thereto, and that in its judgment the order should not be rescinded, altered, modified or amended.

The Railroad Commission also report to the court:

> "That it is the opinion of this defendant, the Michigan Railroad Commission, that the evidence introduced in behalf of complainant, respecting the cost of operation, should not be taken as in any manner conclusive, for the reason that it admittedly relates to a subject with respect to which there is no known method of computation, which fact clearly appears from the evidence submitted in said cause. That this defendant, the Michigan Railroad Commission, further reports that it has on file the annual report of the complainant, the Detroit & Mackinac Railway Company, for the year ending June 30, 1910, showing a net earning of (8.7%) eight and seven-tenths per cent on the value of its road, as shown by its verified amended bill, which said report was filed with the Michigan Railroad Commission on the 17th day of October, 1910, a certified copy of which is hereto attached and made a part of this report."

The cause then coming on for hearing before the court upon all the evidence which had been originally heard by the Commission and additional evidence heard by the court, and the further report of the Commission upon the reference of the case by the court to that body, the court proceeds to discuss the issues, and uses the language quoted by the majority opinion in this case.

However, under the very same subdivision of the opinion wherein the Michigan Supreme Court expressed its regret that it did not have the as-

sistance of distinct findings of ultimate facts, that court used this language:

> "The Legislature has not fixed the freight rates to be charged by complainant beyond this: it has prohibited and made unlawful every unjust and unreasonable charge. It permits reasonable and just rates to be charged for services performed. It has confided to the Michigan Railroad Commission the power, with the duty, to ascertain, in proper cases, whether a rate is reasonable and just or unreasonable and unjust, *and to thereupon* make an order in conformity with the facts. The facts being found, it is the Legislature which speaks, approvingly or disapprovingly, as the case may be. *The important business of the Commission with respect to rates is ascertaining facts.*"

It is very important in this case to know that the Kansas Supreme Court in its opinion in the case of *Union Pacific Railroad Co.* v. *Public Utilities Commission*, 95 Kans. 604, Op. 675; 148 Pac. Rep. 667, Op. 673, quote with approval the language of the Supreme Court of Michigan just recited, that

> "The important business of the Commission with respect to rates is ascertaining facts."

A brief reference to the provision of the Michigan Statute showing wherein the laws of that state differ from the Kansas Public Utilities Act, will more satisfactorily show that the learned

judges who rendered the majority opinion of the Circuit Court of Appeals in this case, entirely misapprehended or misconstrued the real position taken by the Michigan Supreme Court in using the language quoted in the majority opinion herein.

Section 22 of the Michigan Statute creating the Michigan Railroad Commission, and defining its powers and duties (being Section 22 of Act 300 of the Public Acts of 1909), prescribes the procedure before the regulating commission upon complaint of any person interested.

Section 26 of the same statute prescribes the procedure for review of the orders of the Michigan Railroad Commission by the courts. This Section (26) after reciting the proper procedure to confer jurisdiction and bring the controversy to an issue, contains this specific language:

> *"Any party to such suit may introduce original evidence* in addition to the transcript of evidence offered to said commission, and the Circuit Courts in chancery *are hereby given jurisdiction* of such suits *and empowered* to affirm, vacate or set aside the order of the commission in whole or in part, *and to make such other order or decree as the courts shall decide to be in accordance with the facts and the law."*

Also by paragraph (c) of said Section 26, the Michigan Statute provides:

> "If upon the trial of said action, evidence shall be introduced by the complainant, which is found by the court to be different from that offered upon the hearing before the

commission, or additional thereto, *the court before proceeding to render judgment,* unless the parties in such action stipulate in writing to the contrary, *shall transmit a copy of such evidence to the commission,* and shall stay further proceedings in said action for fifteen days after the date of such transmission. Upon receipt of such evidence, the commission shall consider the same, and may alter, modify, amend or rescind its order, etc., *and shall report its action thereupon to said court within ten days of the receipt of such evidence.*"

It is clear therefore, that under the peculiar provision of the Michigan Statute, when a suit or action is begun in the chancery court, by which the order of the Commission is attacked, the procedure prescribed by the statute differs in at least three material respects from that which obtains under the Kansas law in like situations, namely:

(a) The Michigan court sits as an appellate tribunal to consider the Commission's orders and findings upon, first: a transcript of the evidence heard by the Commission, and second, may also try the issues *de novo,* and hear additional evidence, subject however, to the mandatory provisions of the statute requiring recommitment of the whole case to the Commission for further findings; and

(b) The Michigan Railroad Commission thereupon becomes an aid or department of the court itself, and the additional evidence is by the court referred to the Commission, which thereupon pro-

ceeds substantially as would a master in chancery in ordinary proceedings in chancery; and

(c) The court enters its decree as an original finding and determination of the controversy, not necessarily as an affirmance or reversal of the order of the Commission, but independent of the action of the Commission, the court may enter a decree determining all of the issues involved, and the chancery court is specifically clothed with jurisdiction by the statute

> "To make such other order or decree as the court shall decide to be in accordance with the facts and the law."

We submit therefore, that no support is to be found in the decision of the Michigan Supreme Court in the case cited in the majority opinion of the Circuit Court of Appeal for its conclusion "that the Commission when making the order complained of, made no special findings of fact is wholly immaterial."

We contend that it is an elementary rule of law that the orders of a Public Utilities Commission are only valid when on the face of the order it appears that, (1) the Commission had jurisdiction in the particular case to enter an order, and (2) that the necessary facts exist which the statute prescribes as conditions precedent to the Commission taking jurisdiction for the purpose of entering an order substituting new rates for those already in force; and that the application of this elementary rule does not depend on whether or not

the particular statute creating the Commiss' and defining its powers, by express language requires the Commission to make such findings, or whether the act is silent in that regard. Only such orders of the Commission are valid as those which do on their face recite the necessary jurisdictional facts to sustain the acts of the Commission in taking jurisdiction of the particular case.

The Commission being an inferior tribunal, not possessing legislative power, and deriving its just powers from special statutory enactments, exercising jurisdiction not in the course of the common law as courts of general jurisdiction, the fundamental rules governing the jurisdiction of inferior tribunals obtain; and their orders are void in the absence of necessary findings of fact to support the particular order entered.

The same rule obtains in the state of Kansas, where this case originates. The Supreme Court of Kansas, discussing this elementary principle, quote with approval the language above recited from the Michigan Supreme Court in the opinion in *Union Pacific R. R. Co.* v. *Public Utilities Commission*, 95 Kan. 604, Op. 675, which concludes with the significant statement:

> "It (the Legislature) has confided to the Railroad Commission *the power*, with the duty, *to ascertain*, in proper cases, *whether a rate is reasonable and just* or unreasonable and unjust, *and to thereupon make an order* in confirmity with the facts. The facts being found, it is the Legislature which speaks, approvingly or disapprovingly, as the case

may be. *The important business of the Commission with respect to rates is ascertaining facts.*"

It must therefore be conceded that the order in question cannot be sustained as an exercise by the Kansas Public Utilities Commission of any judicial function or prerogative. It is void on its face if it must be supported as a judicial act.

In any event the order in question in this case cannot be treated as a judicial decision for the reason that it is intended to be operative in the future; it does not relate to past or existing conditions. It does not enter any judgment for relief for any present or past wrong or grievance. The Legislature deals with the future, the courts deal with the past and the present.

It being demonstrated that the order cannot be sustained either as a ministerial act by the Commission, nor as the exercise of legislative authority, nor as the exercise of judicial power, we arrive at the only theory upon which any order of any public utilities commission can be sustained, namely: that the Commission acts purely as an administrative agent, exercising administrative functions within the powers conferred upon it by the statute.

It is clear, from a consideration of the provisions of the Kansas statute in question that the Legislature never intended to delegate its legislative powers, neither did the Legislature ever intend to create a commission with judicial powers. It if had done so the law itself would be

void and in violation of the Kansas Constitution. *Goddard* v. *Johnson,* 61 Kan. 803.

The statute creating this Utilities Commission, and under which it functions, is a statute complete in itself, and if applied and construed and followed according to its terms, is valid and constitutional. In the court below we were charged with insisting that the Public Utilities Act under which the Utilities Commission operated is unconstitutional.

We have never contended that the Act itself is unconstitutional; we do not contend that now. The Supreme Court of Kansas has held that it is constitutional and valid. It has been held valid because it has been held to be an Act complete in itself, declaring the law and clothing an administrative tribunal, namely: the Public Utilities Commission, with the duty of determining the existence or non-existence of facts in proper proceedings which make the law operative and applicable.

If any other construction than this be placed upon the Kansas statute, we have contended and now contend that the Act would be unconstitutional and invalid.

And we contend now that to place upon this statute the construction which the majority opinion of the Circuit Court of Appeals would give it, would render the Act invalid and unconstitutional for reasons heretofore discussed in this brief.

But we are not concerned in this case with the question of the constitutionality or invalidity of the Public Utilities Act, as a statute; we are only concerned with the validity of the order appearing

on the second page of this brief. We contend that this order is void under the admitted facts appearing on the face of the record. The District Court held that the order was void for reasons stated in the opinion, which were summarized by that court in its opinion appearing in the transcript of the record herein at page 39, as follows:

> "(1) Because there is neither found nor stated therein any reason, ground or justification for annulling and abrogating the contract between the parties, valid when made and in full force, effect and operation when the Public Utilities Commission came into existence as a creature of the state.
>
> (2) For the reason no facts are found or stated in the order of the Commission sustaining, or tending to sustain the exercise of its statutory powers and functions as prescribed in the Public Utilities Act; and
>
> (3) Further, no finding of the reasonableness or unreasonableness of the contract rates existing between the parties is made, and no finding is made showing or tending to show any discrimination between the contract rates and other rates or charge for service charged other members of the public, or other justification or excuse for the making of the order, except the mere caprice or whim of the Commission, based on the ground the net revenues of intervener will be temporarily decreased if certain other changes in rates shall in future be made by the Commission."

Circuit Judge Sanborn, in the dissenting opinion declaring the order in question void, has used the following language in supporting his conclusions:

> "When carefully analyzed and reduced to its lowest term the only ground for the raising of the contract rates stated in the petition of the Gas & Electric Company and the only basis for the order of the Commission raising them upon that petition is, in my opinion, that the contract rates which the petition shows were so much more profitable during the first years of the term of the contract than it anticipated, that in December, 1916, the Gas & Electric Company filed with the Commission and asked approval of a schedule of reduced rates (affecting only its small consumers, 17,000 in number) became in 1917 so much less profitable that it filed its petition for this raise. The petition does not show what profit the Gas & Electric Co. derived from the contract rates during the years prior to 1917. It does not show that the contract rates have been or will be confiscatory. It does not show that the welfare of the public demands the increase, and in my opinion it states no facts or case within the jurisdiction of the Commission, its order was made without jurisdiction and is void."

Yet the majority opinion of the Circuit Court of Appeals and from which this appeal is prosecuted amounts in effect to putting an unconstitutional construction upon a valid statute of the state of Kansas, with the result and effect of depriving appellant of its property, without due process of law. In this connection it will be remembered

and borne in mind that the due process clause applies to and is a limitation upon every department of government, whether judicial, legislative or executive, and in whatever manner or by whatever tribunal the exercise of governmental powers may be attempted.

It is important therefore at this time to observe the specific provisions of the Public Utilities Commsision Act of the State of Kansas. It is only necessary to quote the particular sections of that statute which apply to and govern the issues involved in this case.

Section 13 of that Act provides:

> "13. It shall be the duty of the commission, either upon complaint or upon its own initiative, to investigate all rates, joint rates, fares, tolls, charges and exactions, classifications or schedules of rates, or joint rates and rules and regulations, *and if after full hearing and investigation* the commission *shall find* that such rates, joint rates, fares, tolls, charges or exactions, classifications or schedules of rates or joint rates, or rules and regulations, are unjust, unreasonable, unjustly discriminatory or unduly preferential, the commission shall have power to fix and order substituted therefor such rate or rates, fares, tolls, charges, exactions, classifications or schedules of rates or joint rates and such rules and regulations *as shall be just and reasonable*. If upon any investigation it shall be found that any regulation, measurement, practice, act or service complained of is unjust, unreasonable, unreasonably inefficient, insufficient, unduly preferential, unjustly discriminatory, or otherwise in violation of any

of the provisions of this act or of *the orders of this commission*, or if it be found that any service is inadequate or that any reasonable service cannot be obtained, the commission shall have power to substitute therefor such other regulations, measurements, practices, services or acts, and to make such order respecting any such changes in such regulations, measurements, practices, service or acts *as shall be just and reasonable*. Whenever, in the judgment of the Public Utilities Commission, public necessity and convenience require, the commission shall have power to establish just and reasonable concentration, commodity, transit or other special rates, charges or privileges, but all such rates, charges and privileges shall be open to all users of a like kind of service under similar circumstances and conditions."

Section 14 of that Act provides:

"*Upon a complaint in writing* made against any common carrier or public utility governed by the provisions of this act, by any mercantile, agricultural or manufacturing organization or society, or by any body politic or municipal organization or by any taxpayer, firm, corporation or association, that any of the rates or joint rates, fares, tolls, charges, rules, regulations, classifications or schedules of such public utility or common carrier *are in any respect unreasonable, unfair, unjust, unjustly discriminatory or unduly preferential, or both*, or that any regulation, practice or act whatsoever affecting or relating to any service performed or to be performed by such public utility or common carrier for the pub-

lic is in any respect unreasonable, unfair, unjust, unreasonably inefficient, insufficient, unjustly discriminatory or unduly preferential, or that any service performed or to be performed by such public utility or common carrier for the public is unreasonably inadequate, inefficient, unduly insufficient or cannot be obtained, *the commissioners shall proceed, with or without notice, to make such investigation as they may deem necessary.* The commissioners may, upon their own motion, and without any complaint being made, *proceed to make such investigation,* but no order affecting such rates, joint rates, tolls, charges, rules, regulations and classifications, schedules, practices or acts complained of shall be made or entered by the commission without a formal public hearing, of which due notice shall be given by the commission to such public utility or common carrier or to such complainant or complainants, if any. Any public investigation or hearing which such commission shall have power to make or to hold may be made or held before any one or more commissioners, and all investigations, hearings, decisions and orders made by a commissioner shall be deemed and held to be the investigations, hearings, decisions and orders of the Public Utilities Commission, when approved and filed by such commission and filed in their office, and the commission shall have power to require such public utilities and common carrier to make such improvements and do such acts as are or may be *required by law* to be done by such public utility or common carrier."

Section 16 of that Act provides:

"If upon such *hearing and investigation* the rates, joint rates, fares, tolls, charges, rules, regulations, classifications, or schedules of such common carrier or public utility governed by the provisions of this act, *are found to be unjust, unreasonable, unfair, unjustly discriminatory or unduly preferential, or in any wise in violation of the provisions of this act, or of any of the laws of the state of Kansas*, the Public Utilities Commission shall have the *power* to fix and establish, and to order substituted therefor, such rates, joint rates, fares, tolls, charges, rules, regulations, classifications or schedules *as it shall find, determine or decree to be just, reasonable and necessary; and if it shall be found* that any regulation, practice or act whatsoever, relating to any service performed or to be performed by such public utility or common carrier for the public is in any respect *unreasonable, unjust, unfair, unreasonably inefficient, insufficient, unjustly discriminatory or unduly preferential, or otherwise in violation of any of the provisions of this act, or of any of the laws of the state of Kansas*, the Public Utilities Commission shall have full power, authority and jurisdiction to substitute therefor such other regulations, practice, service or act *as they find and determine to be just, reasonable and necessary*. All orders and decisions of the Public Utilities Commission whereby any rates, joint rates, fares, tolls, charges, rules, regulations, classifications, schedules, practice or acts relating to any service performed or to be performed by such public utility or common carrier for the public are altered, changed, modified, fixed or estab-

lished, shall be reduced to writing and a copy thereof, duly certified, shall be served on the public utility or common carrier affected thereby, by registered mail; and such order and decision shall become operative and effective within thirty days after such service, and such public utility or common carrier shall, unless an action is commenced in a court of proper jurisdiction to set aside the findings, orders and decisions of said Public Utilities Commission, or to review and correct the same, carry the provisions of said order into effect."

The foregoing are the only sections that are important in the consideration of this case; they are the only sections of this statute under which any valid order could have been entered by the Public Utilities Commission in any proceeding or upon any state of facts to change the contract rates existing between the Electric Company and the Street Railway Company.

The majority opinion seeks to give some application to Section 20 of the statute in question, which reads as follows:

"Sec. 20. Whenever any common carrier or public utility governed by the provisions of this act shall desire to make any change in any rate, joint rate, toll, charge or classification or schedule of charges, or in any rule or regulation or practice pertaining to the service or rates of any such public untility or common carrier, such public utility or common carrier shall file with the Public Utilities Commission a schedule showing the changes desired to be made and put in force by such

public utility or common carrier, and such changes shall be plainly indicated by proper reference marks in amendments or supplements to existing tariffs, schedules or classifications, or in new issues thereof. No change shall be made in any rate, toll, charge or classification or schedule of charges, joint rates, or in any rule or regulation or practice pertaining to the service or rates of any such public utility or common carrier, without the consent of the commission, and within thirty days after such changes have been authorized by said Public Utilities Commission, then copies of all tariffs, schedules, and classifications and all rules and regulations shall be filed in every station, office or depot of every such public utility and every common carrier in this state, for public inspection."

It is implied from the reference by the court to this section that inasmuch as the Commission is given authority to approve a schedule of rates and charges, which may be filed by public utilities, that therefore they may by virtue of this section refuse to approve the schedule filed by the petitioner and fix other and different rates and charges which they shall determine to be just and reasonable, without any previous hearing, investigation or determination.

In the instant case it is patent that this proceeding before the Public Utilities Commission was not governed by the provisions of Section 20.

The rates filed by the Kansas Gas and Electric Company with the Commission were not the rates which the Commission established. The Commis-

sion declined to approve the rates prescribed in the schedule of the petitioner. On the contrary, the Commission entered upon a hearing pursuant to the petition filed by the Electric Company, heard evidence, and entered the order fixing entirely different rates from those petitioned for.

We earnestly insist that the conclusion reached by Circuit Judge Sanborn in the dissenting opinion is manifestly correct, that the petition which the Electric Company filed did not confer any jurisdiction on this Commission to establish rates which were to apply to and modify and abrogate the contract rates fixed in the contract with appellant.

There is not a suggestion in the petition of the Electric Company for authority to add surcharges to its rates, that there was in fact any contract in existence between it and appellant. The contract is not referred to. The petition simply asks authority to add surcharges to petitioner's rates.

There is nothing on the face of the petition to indicate to the Commission that the Electric Company had enered into any contract with the appellant for any term of years at any stipulated rate of charge for electric current.

Surely, therefore, the Commission had no pleading before it giving it jurisdiction to enter any order abrogating the contract rate which appellant contends has never been legally disturbed, modified or abrogated.

Just how the utilities commission could enter an order which abrogated a contract between the Kansas Gas and Electric Company, Appellee, and

the Wichita Railroad and Light Company, Appellant, without there appearing either in the petition or any other pleading before the Commission any suggestion or intimation that such contract was in existence, is certainly anomalous.

At the very threshold of the case, therefore, as Circuit Judge Sanborn so tersely and clearly presents in his dissenting opinion, it is patent on the face of the record that the jurisdiction of the Commission had never been invoked to investigate or determine the reasonableness or justness of the contract rates which the appellee Electric Company claims have been abrogated by the order involved herein.

Surely the Commission by entering a blanket order giving a public utility the right to add surcharges to its rates, cannot be presumed to have considered or adjudicated any issue as to whether or not the contract rates were reasonable. If there was nothing in the petition presenting to the Commission the fact that a contract was in existence, then there was certainly no jurisdiction in the Commission to enter an order abrogating such contract.

To hold otherwise would be to violate the fundamental principle that a party in interest has a right to have his day in court or his opportunity to be heard before his property can be jeopardized, destroyed or taken from him.

On the face of the record in this case, the Electric Company has secured an order abrogating its contract with appellant and requiring appellant to pay large additional compensation for electric cur-

rent above that provided in its solemn and binding contract, which had been in existence before the Commission was organized, and which does not expire until 1930, without appellant ever having had any opportunity to join issue upon any allegation questioning the reasonableness of such contract rates.

We presume that appellee contends that the passage of the Public Utilities Act by the Legislature of the State of Kansas operated automatically to overthrow and annul all existing contracts between Public Utility corporations, without any consideration being given to the elementary rule that there must be first an adjudication and finding that the enforcement of such contract rates in the future would affect the public weal, or justify the exercise of the police power of the State in the public interest.

The Supreme Court of the State of Kansas, in *Kaul* v. *Telephone Co.*, 95 Kan. 1, a case involving facts very similar to those here involved, held that:

> "The contract in question was made long before the act referred to was passed, and was in force when the Public Utilities Commission came into existence, and while that Commission is vested with broad regulatory powers it is not shown nor claimed that it has found the contract rates to be unreasonable. Granting, without deciding, that the Commission has the power under the law to determine whether or not the rates prescribed by the contract are reasonable and valid, and to revise them if found to be unreasonable, it does not appear that it has exercised the

> power, nor that they have been presented to it for its consideration. *The passage of the act did not automatically overthrow contracts, nor set aside schedules of rates which had been agreed upon. Neither did the fact that the defendant published and filed a schedule of rates with the Public Utilities Commission abrogate the contract.* In any event, rates previously agreed upon between utilities and patrons will continue in force *until the Commission has found them to be unreasonable,* and has prescribed other rates."

The Kansas Public Utilities Law, chap. 238 of the Session Laws of Kansas, 1911, under which the Commission assumed to act in making the order herein complained of, in section 16 specifically provides that before the Public Utilities Commission shall have power to fix and establish new rates and order such new rates substituted for existing rates, the Commission *must find* existing rates to be "unjust, unreasonable, unfair, unjustly discriminatory or unduly preferential, or otherwise in violation of the provisions of this act or any of the laws of the State of Kansas."

Section 13 of the act contains substantially the same provision.

Section 16 further provides that *if existing rates are* by the Commission *found* to be discriminatory, unjust, unreasonable, etc., *then* the Commission shall have power to order substituted therefor such rates as "it *shall find* and determine to be just, reasonable and necessary."

Section 16 of the act also provides that all orders of the Commission

> "shall be reduced to writing, and a copy thereof, duly certified, shall be served on the public utility or common carrier affected thereby, by registered mail; and such order and decision shall become operative and effective within thirty days after such service, and such public utility or common carrier shall, *unless an action is commenced in a court of proper jurisdiction to set aside the findings, orders and decisions of said Public Utilities Commission, or to review and correct the same, carry the provisions of said order into effect.*"

This section clearly announces the intent of the legislature that the Commission must incorporate its findings within its written order, otherwise a public utility dissatisfied with the order could not commence an action in a court of proper jurisdiction "to set aside the findings" of the Public Utilities Commission. A finding which has not been made, or which is not known, or disclosed by the order, cannot be "set aside." Neither can a court review and correct the same. It is, therefore, clearly apparent that the orders of the Commission must on their face disclose the findings, orders and decisions of the Commission in order that they may be reviewed, corrected or set aside by a court of proper jurisdiction. Otherwise the utility whose rights are invaded has no remedy, and the order is void under the Kansas statute because of the omission of such findings.

We emphatically declare that it is not our position that the state was without power to abrogate the contract rates in proper cases and by appropriate proceedings, but we do insist that the only basis or justification for the power of the state to abrogate such contract rates would obtain *when it was found and determined* that the public interest required such action and procedure.

The case referred to in the majority opinion of the Circuit Court of Appeals as conclusively determining the right of the State of Kansas to enact a law abrogating contract rates in force by public utilities, namely:

Union Dry Goods Co. v. Georgia Public Service Corporation, 248 U. S. 372, clearly has no application to a case where the record shows that the contract rates were not challenged by the pleadings; surely it has no application to a case where there is no finding or reference in the order or decision of the Utilities Commission that it even considered the question of the reasonableness of the contract rates.

On the contrary, this court there expressly held that the private contract rights obtaining under existing contracts would yield only to the public welfare, where the same is declared and defined, and the two conflict, and that exact language is quoted from the Union Dry Goods Co. case in the majority opinion of the Circuit Court of Appeals.

In all the cases where contract rates have been abrogated by an order of the Public Utilities Commission, there has been presented to and investigated by the Commission the important question

of whether or not the existence and future application of these contract rates in any manner affect the public welfare.

We therefore submit:

That the order entered by the Kansas Public Utilities Commission, which is manifestly nothing more nor less than a declaration by the Commission that according to its caprice, or whim or judgment, the appellee, Electric Company, shall be allowed to add surcharges to its rates increasing as the quantity of current consumed per month by its respective consumers increases, is void upon its face.

That as pointed out by Judge Sanborn in his dissenting opinion, there was no sufficient averment in the petition filed by the Electric Company with the Utilities Commission as could give that Commission jurisdiction to abrogate the contract rate between the Electric Company and the appellant.

That the complete failure of the order in question to show any consideration of the element of public welfare in connection with the existence or modification of the contract rate between the Electric Company and the appellant, is conclusi against the claim of the Electric Company that it can, by virtue of this order, declare and effectuate any impairment or abrogation of the agreed rates prescribed by its contract with appellant.

That the protection of the due process clause of the Federal Constitution is lost to appellant, if the

Kansas Public Utilities Commission can, by a blanket order, without even referring to the contractual relationship involved, deprive appellant of its rights under its contract with the Electric Company, without, so far as the record shows, even giving appellant "its day in court" to be heard in this drastic confiscation of its property and contractual rights.

That in any event, appellant can not in this summary way be deprived of its right to a trial upon the merits of its case in the district court, by the entry of a final judgment upon an interlocutory motion not involving any of the merits of the controversy.

Respectfully submitted,

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Office Supreme Court,
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WM. R. STANS
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No. [redacted]27

In the

Supreme Court of the United States

October Term, [redacted] 1922

THE WICHITA RAILROAD & LIGHT COMPANY,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS and KANSAS GAS & ELECTRIC COMPANY, *Appellees.*

Appeal From the United States Circuit Court of Appeals for the Eighth Circuit.

STATEMENT AND BRIEF ON BEHALF OF APPELLEES.

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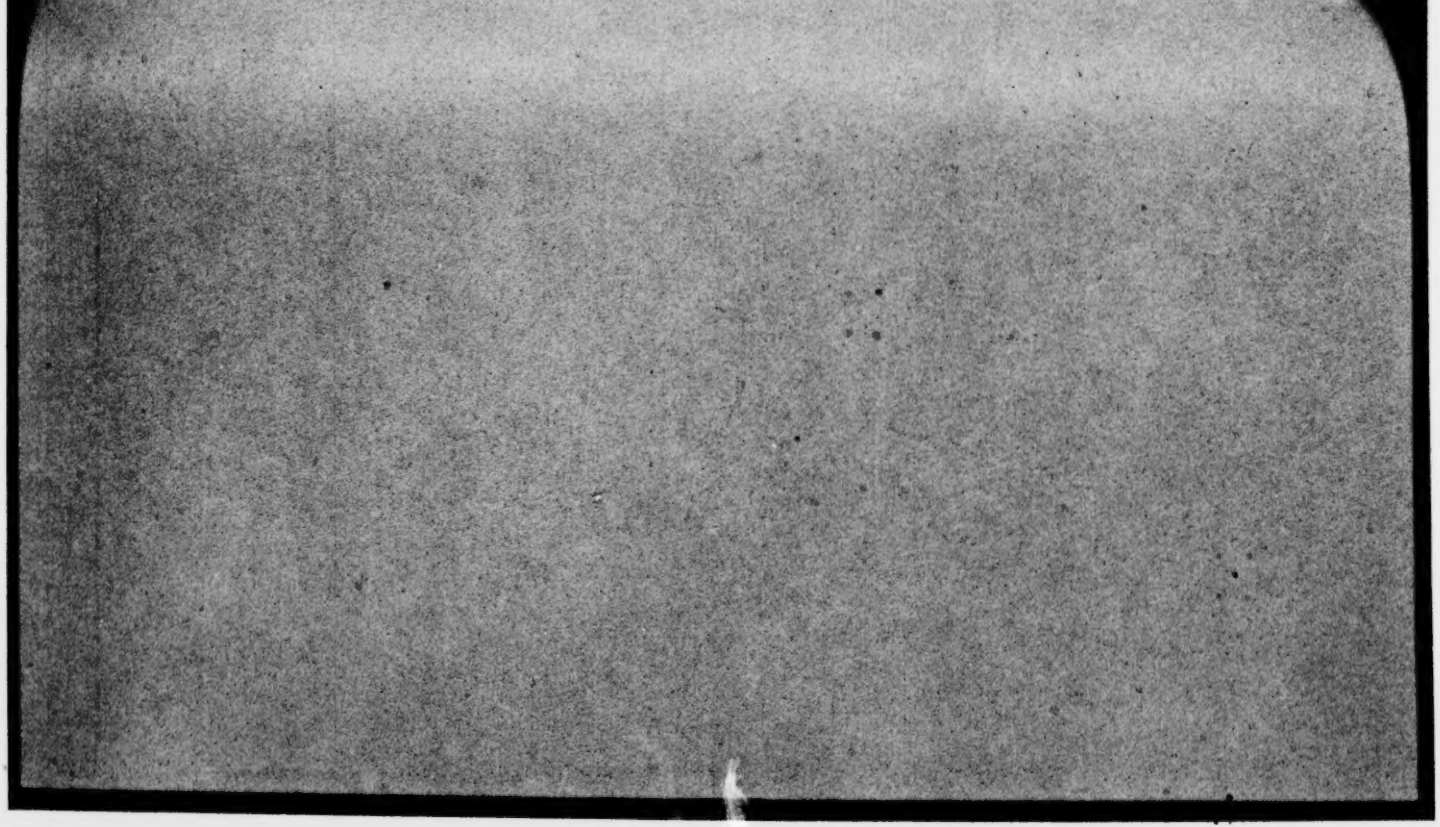

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In the

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October Term, 1921.

THE WICHITA RAILROAD & LIGHT COMPANY,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS and KANSAS GAS & ELECTRIC COMPANY, *Appellees.*

Appeal From the United States Circuit Court of Appeals for the Eighth Circuit.

STATEMENT AND BRIEF ON BEHALF OF APPELLEES.

No. 217.

STATEMENT.

This suit was filed in the District Court of the United States for the District of Kansas on April 24, 1918, and was brought by the Wichita Railroad & Light Company, appellant, against the Public Utilities Commission of the State of

Kansas, appellee, to restrain the Commission from putting into effect an order authorizing Kansas Gas & Electric Company to add a surcharge to certain of its rates for electricity furnished consumers in the State of Kansas. (Pages 2 to 20, transcript of record.)

A temporary restraining order was granted by the court restraining and enjoining said Public Utilities Commission and its members from enforcing said order (page 25).

On May 14, 1918, the Public Utilities Commission filed its answer to the bill of complaint (page 27).

On May 25, 1918, a stipulation was filed in the case providing, among other things, that the restraining order should continue in force as a temporary injunction until the further order of the court, and that upon the final hearing the transcript of the evidence taken before the Public Utilities Commission at the hearing of the application for said surcharge might be used by either side, subject to objection as to competency, relevancy, or materiality, and that either side might introduce such further competent, relevant and material evidence as it might desire (page 26).

On November 13, 1918, appellant filed its motion, praying for a final judgment and decree upon the pleadings consisting of the bill of complaint and answer and on the said stipulation (page 28).

On February 7, 1919, Kansas Gas & Electric Company filed its application for leave to file its intervening petition herein, which application was

granted by the court (page 21), and said intervening petition was filed on the said February 7, 1919 (page 22).

Thereupon and on the 5th day of March, 1919, appellant filed its motion for the entry of a final judgment upon said intervening petition, the bill of complaint, the answer of the Public Utilities Commission, and upon said stipulation and upon the motion theretofore filed by appellant for final judgment and decree against the said Public Utilities Commission (page 30).

On June 6, 1919, the trial court, by its judgment and decree, sustained the said motions for judgment upon the pleadings, and upon said stipulation, the court in said judgment and decree finding that the said order of the Public Utilities Commission authorizing and permitting Kansas Gas & Electric Company to add a surcharge to its existing rates for electricity supplied by it to its consumers in the State of Kansas, is as to the appellant void and unenforceable for reasons hereinafter stated (page 42).

The court further found that the said temporary injunction should be made permanent, perpetually restraining and enjoining appellees from enforcing or attempting to enforce as against appellant the rates or surcharges authorized and permitted by the said order. Judgment was entered in accordance with said findings sustaining the said motions of the appellant for judgment on the pleadings, adjudging said order to be null and void as against appellant and perpetually restraining and enjoining appellees from enforcing or attempt-

ing to enforce as against the appellant said order of the Public Utilities Commission. From this decree the appellees appealed to the United States Circuit Court of Appeals for the 8th Circuit, in which court on January 17, 1921, as of July 15, 1920, a decree was entered, reversing the said decree of the District Court and remanding the case to the District Court with instructions to dismiss the complaint (page 95).

The opinion of the United States Circuit Court of Appeals, together with the dissenting opinion of Judge Sanborn, appears in the transcript of the record beginning at page 53 and is reported in 268 Federal Reporter, page 37.

The undisputed facts set out in the pleadings and in the stipulation and upon which said decrees were entered are as follows:

Appellant is a corporation organized and existing under the laws of the State of West Virginia and is a citizen and resident of that state, and is authorized to do business in the State of Kansas, and is engaged in the business of operating a street railway within the City of Wichita, Kansas (page 2).

Appellee, Kansas Gas & Electric Company, is a corporation organized and existing under the laws of the State of West Virginia, and is authorized to do business in the State of Kansas, and is and was at the times hereinafter mentioned, engaged, among other things, in the business of furnishing electric light and power to consumers in the State of Kansas, and particularly in the City of Wichita, in said state (page 22).

Appellee, the Public Utilities Commission of the State of Kansas, is a board or commission created and existing under and by virtue of an act of the Legislature of the State of Kansas passed in the year 1911, and being Chapter 238 of the Laws of Kansas of 1911. The said appellee Commission is and has been since the passage of said law, vested with full power, authority and jurisdiction to supervise and control public utilities, doing business in the State of Kansas, and to fix and regulate the rates to be charged by said utilities for service, said power, authority and jurisdiction having been delegated by the State of Kansas by said act of the Legislature to said Public Utilities Commission (page 22).

That the amount in controversy in this suit exceeds the sum of $3,000.00 (page 2).

On May 2, 1910, appellee, Kansas Gas & Electric Company, and appellant entered into a written contract, by the terms of which for a period expiring November 30, 1930, said appellee agreed to furnish and appellant agreed to receive and pay for, electrical capacity and energy necessary in the operation of the street railroad system of the appellant in the City of Wichita, Kansas, and said contract fixed the rates to be paid by appellant for said service. That since the date when said contract became effective and up to and including the filing of the electric company's intervening petition herein, said appellant has received from said electric company the electrical capacity and energy necessary for the operation of said railroad (page 22).

A copy of said contract is set out in the transcript of the record, beginning at page 8.

That prior to the 25th day of March, 1918, Kansas Gas & Electric Company filed with the Public Utilities Commission its application for permission to add a surcharge to certain of its rates for electricity, a copy of which application is attached, as an exhibit, to the bill of complaint (page 18).

That in said application said electric company represented that its rates for electricity, then in force, were based upon the cost of producing and distributing electrical energy during normal times and when made were intended to yield, and did yield, a reasonable return only upon the value of its property used and usable in producing and distributing electrical energy in the State of Kansas. That on account of the unusual conditions then existing due to the fact that the nation was at war, the cost to said company of producing and distributing electrical energy had increased enormously, principally on account of the increased cost of fuel and labor; that if the company's existing rates were continued in effect under conditions then existing, the result would be to deprive it of a reasonable return upon the value of its property, and Kansas Gas & Electric Company prayed the Commission for an order authorizing it to add a surcharge to its existing rates sufficient to reimburse it for the increase in the cost of fuel, due to said war conditions (page 23).

It was alleged in said application that the cost to the said electric company of producing electrical energy for the year ending December 31, 1917, was approximately 100% greater than the cost of production in the year 1914, at which time the company had filed its schedule of rates with the Public Utilities Commission, and at which time normal conditions prevailed. That on account of such increase in the cost of production and distribution, the net income of the Electric Company for the year ending December 31, 1917, was approximately $190,000.00 less than it would have been if the electric company had been able to operate under the normal conditions existing in 1914. That if the electric company's existing rates were continued in effect, the result would be disastrous to the company, depriving it of a reasonable return upon the value of its said property, making it impossible to find a market for the securities which it must issue and sell in order to provide funds with which to make improvements, additions and betterments, which would be necessary if it was to furnish proper and adequate service to the communities in which it operated. The application thereupon asked that in order to increase the net earnings of the electric company to an amount sufficient to offset the loss resulting to it from said war conditions an order be entered by the Commission, authorizing the company to add to its existing rates the surcharge mentioned in the application. The application further stated that there were approximately 19,900 consumers of electricity served by the electric company. The

proposed surcharge did not effect consumers using 100 kilowatt hours or less, per month, and therefore 17,000 of the said total number of consumers would not be affected by the order. In apportioning the surcharge equitably among the remainder of the consumers, the application stated that the applicant had taken into consideration the fact that in the generation of electrical energy for large power consumers, fuel is approximately 75% of the cost of generation, and that therefore a surcharge which has for its purpose the reimbursement of the electric company for increase in the cost of fuel should be so adjusted that the surcharge would increase in proportion to the amount of energy consumed. The applicant, therefore, prayed that the electric company be authorized to add to its existing rates for electricity in the State of Kansas until the further order of the Commission, the following surcharges:

For the first 100 kilowatt hours, per month, no surcharge.
For the next 1000 kilowatt hours, per month, 12 mills per kilowatt hour.
For the next 10000 kilowatt hours, per month, 9.5 mills per kilowatt hour.
For all excess kilowatt hours, per month, 3.5 mills per kilowatt hour (page 18).

After the filing of said application, appellee, Public Utilities Commission, after due and legal notice to all parties concerned, including the appellant, entered upon the hearing of said application (pages 3 and 23).

That at said hearing evidence was introduced in support of and in opposition to said application, and the Commission, after full investigation, and being fully advised in the premises, on the 25th day of March, 1918, entered its order, by the terms of which it found that the electric company should be authorized and permitted to add to its existing rates for electricity supplied by it to consumers in the State of Kansas until the further order of the Commission, the following surcharges:

For the first 100 kilowatt hours, per month, no surcharge.
For the next 14900 kilowatt hours, per month, 1 mill per kilowatt hour.
For the next 20000 kilowatt hours, per month, 2 mills per kilowatt hour.
For all excess over 35000 kilowatt hours, per month, 3 mills per kilowatt hour (page 23).

The said order further authorized and permitted the electric company to add to its existing rates for electricity supplied by it to consumers in the State of Kansas the said surcharge until the further order of the Commission. Said surcharge order has not been revoked or modified and was at the time of the institution of this suit and the filing of the intervening petition herein in full force and effect (page 23).

A copy of said order is attached, as an exhibit, to the bill of complaint (page 7).

The intervening petition alleged that since the surcharge order became effective, to-wit: May 1, 1918, and up to and including December 31, 1918,

the electrical energy furnished by the electric company to the appellant amounted to 3,179,689 kilowatt hours, and that the surcharge due from the appellant to the electric company under said order of the Public Utilities Commission on account of the energy so furnished amounted to $9,088.18. The intervening petition further alleged that Kansas Gas & Electric Company has an interest in the matter being litigated in this case, it being the party entitled to the benefits to be derived from said order, and being the real party injured, and damaged, by the granting of said injunction and prayed that said injunction be dissolved and that it be permitted to enforce the said order against appellant (page 25).

The bill of complaint alleged, as grounds for the injunction prayed for, that the said order of the Public Utilities Commission was invalid and void for the following reasons:

1. The Public Utilities Commission of the State of Kansas was without jurisdiction to hear or determine any question relative to the appellant, for the reason that appellant conducts its business wholly within the city of Wichita, and is not subject under the public utilities law of Kansas to control or regulation by the Public Utilities Commission.

2. That the Public Utilities Commission was without power or authority to change or modify the written contract of May 2nd, 1910, between appellant and the Electric Company; said contract having been entered into prior to the passage of

the public utilities law of the State of Kansas. Said contract is protected by Section 10 of Article 1 of the Constitution of the United States, which forbids any state to pass any law impairing the obligation of contracts. That the public utilities law of the State of Kansas, if applicable to said contract, is repugnant to said provision of the Constitution and is, therefore, null and void.

3. That the added charges fixed by the order of the Public Utilities Commission of March 25th, 1918, are preferential and discriminatory against the appellant because the rates were fixed upon a scale increasing as the volume of consumption increased.

4. That the rates fixed by said order are unreasonably high and are confiscatory and result in the taking of the property of appellant without due process of law, thereby depriving appellant of the equal protection of the law, in violation of the 5th and 14th Amendments of the Constitution of the United States (pages 3, 4 and 5).

The trial court, however, in its decree sustaining the motion for judgment on the pleadings, found the said order of the Public Utilities Commission of March 25th, 1918, to be void and unenforceable against the appellant for the following two reasons, neither of which was pleaded in the bill of complaint:

> "(1) Because there is neither found nor stated in said order any reason, ground or justification for annulling and abrogating the contract between the parties, valid when made and in full force, effect and operation when

the Public Utilities Commission came into existence as a creature of the state.

(2) For the reason that no facts are found or stated in the order of the commission sustaining or tending to sustain the exercise of its statutory powers and functions as prescribed in the Public Utilities Act; and further, no finding of the reasonableness or unreasonableness of the contract rates existing between the parties is made, and no finding is made showing or tending to show any discrimination between the contract rates and other rates of charge for service charged other members of the public, or other justification or excuse for the making of the order except the mere caprice or whim of the commission based on the ground that the net revenues of intervener will be temporarily decreased if certain other charges in rates shall in the future be made by the commission" (page 43).

The court in its written opinion said:

"A reading and consideration of the briefs and arguments of solicitors for the respective parties, and a reference to the many adjudicated cases cited, and quoted from leaves no room for doubt whatever but that contracts between public utility corporations, similar to that involved in this case, are not in all things afforded such full and complete protection against impairment of their obligations by subsequent legislative enactment of a state, under Article 1, Section 10, of the National Constitution as is afforded purely private contracts between individual citizens or corporate bodies."

The court further held that contracts of this character are made in view of existing law and the rights of the state to impair the obligation of contracts in the exercise of its reserve police power (page 37).

From this judgment and decree appellees, The Public Utilities Commission and Kansas Gas and Electric Company appealed to the United States Circuit Court of Appeals. The appellant Wichita Railroad and Light Company did not appeal therefrom. The Circuit Court of Appeals reversed the cause and from that court's decree appellant has brought its appeal to this court.

APPELLEES' BRIEF AND ARGUMENT.

I.

Contract rates not protected by Article 1, Section 10 of the Constitution of the United States.

The bill of complaint alleges that the regulation and change of rates fixed in the contract between appellant and Kansas Gas and Electric Company are not within the police power of the State of Kansas and that the contract is within the protection of Section 10, Article 1, of the Constitution of the United States, which forbids any state to pass any law impairing the obligation of contracts.

The United States District Court ruled against appellant on this contention. That court expressly held that the Public Utilities Commission had the power to change rates fixed by contract. The court in its opinion said:

> "And for this reason, all contracts are made in view of existing law, and the right of the state to impair the obligation of contracts in the exercise of its reserve police power becomes a part of the contract when entered into. Therefore, the exercise of such right is excepted from the general prohibition found in Article I, Section 10, of the Constitution against the impairment of existing contracts by legislative enactment" (page 37).

On the appeal of this case to the United States Circuit Court of Appeals that court in its opinion said:

> "That the effect of the order would be to nullify the contract, theretofore entered into by the parties does not make the order obnoxious to the constitutional provision, prohibiting states to enact laws, impairing the obligation of contracts, has been conclusively determined in *Union Dry Goods Co.* v. *Georgia Public Service Corporation*, 248 U. S. 372. The court in its opinion said:
>
> 'Except for the seriousness with which this claim has been asserted and is now pursued into this court, the law with respect to it would be regarded as so settled as not to merit further discussion.
>
> That private contract rights must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict, has been often decided by this Court.' Citing a number of authorities.
>
> The same conclusion was reached in *Producers' Transportation Company* v. *Railroad Commission*, 251 U. S. 228, where the court said:
>
> 'That some of the contracts before mentioned were entered into before the statute was adopted or the order made, is not material.'
>
> This disposes of the claim that the Commission was without authority to make the order, to affect the contract of the plaintiff because it was made before the Act creating the Public Utilities Commission was enacted.

In *Kansas City Bolt & Nut Co.* v. *Kansas City Light & Power Co*, 275 Mo. 529, 204 S. W. 1074, it is held:

Rates fixed by contract with a public service company for electricity to be supplied, are superseded by rates fixed by the Public Service Commission, since the police power of the State cannot be abridged by contract. On writ of error from the Supreme Court, this judgment was affirmed by a *per curiam* opinion upon the authority of *Union Dry Goods Co.* v. *Georgia Public Service Corporation*, 251 U. S. * * *" (page 58).

That this constitutional question has ceased to be real or substantial is shown conclusively by the decisions of this court in many cases, of which perhaps the most recent are:

Union Dry Goods Company v. *Georgia Public Service Corporation*, 248 U. S. 372, 63 L. ed. 309.

Kansas City Bolt and Nut Co. v. *Kansas City Light & Power Company*, 252 U. S. 571, 64 L. ed. 721.

The Kansas City Bolt and Nut Company case came to this court by writ of error from the Supreme Court of Missouri. It appears from the report of the case in that court (275 Mo. 529) that the case involved the alleged rights of the Bolt and Nut Company under a contract entered into between the Bolt and Nut Company and the Power Company on September 6, 1912. By the terms of this contract the rates to be charged for electric energy for the operation of the manu-

facturing plant of the Bolt and Nut Company were fixed for the period of the contract. The Public Service Commission of Missouri was established by an act of the legislature of 1913. On April 17, 1917, the Public Service Commission made an order establishing a schedule of rates which the Power Company should be permitted to charge for electric energy at Kansas City, Missouri. The cost to the Bolt and Nut Company for electrical energy under the rates thus established by the Commission were higher than the rates fixed by the contract. The Supreme Court of Missouri held that the Public Service Commission, in the exercise of the police power of the state, had the power to supersede the rates fixed by this contract by establishing a general schedule of rates for electric energy although the contract was entered into before the Public Service Commission was established. This decision was affirmed by this court in a memorandum opinion upon authority of the Union Dry Goods Company case.

But counsel say in their argument (page 61):

> "We emphatically declare that it is not our position that the state was wthout power to abrogate the contract rates in proper cases and by appropriate proceedings, but we do insist that the only basis or justification for the power of the state to abrogate such contract rates would obtain *when it was found and determined* that the public interest required such action and procedure."

And again (page 45):

> "The Commission, being an inferior tribunal not possessing legislative power and deriving its just powers from special statutory enactments, exercises jurisdiction not in the course of the common law as courts of general jurisdiction, the fundamental rules governing the jurisdiction of inferior tribunals obtain; and their orders are void in the absence of necessary findings of fact to support the particular order entered. The same rule obtains in the State of Kansas where this case originates."

Here we have counsel's statement of what they conceive to be the real question in this case. We have then only for determination what seems to us to be a question involving solely a construction of the statute of the State of Kansas creating the Public Utilities Commission and prescribing the conditions under which and the manner in which it may exercise the power of rate-making.

The construction of a state statute does not itself present a federal question.

> *Knop* v. *Monongahela River Consolidated Coal and Coke Company*, 211 U. S. 485, 53 L. ed. 211.

If in this situation this court will retain jurisdiction of this case we submit the following suggestions in support of the decree of the United States Circuit Court of Appeals, from which this appeal is taken.

II.

The order of the Public Utilities Commission is not invalid because it contains no findings of facts.

The decree of the trial court was based upon the failure of the Commission to recite in its order the jurisdictional facts upon which the order was based. The District Court said:

> "Coming now to the order of the Commission itself, it is found no jurisdictional facts calling its statutory powers into action are stated; no finding of unreasonableness of the contract rates existing between the parties is made; no finding the same are in their nature discriminatory, unreasonable, unjust, or the carrying out of the contract will in any manner, form or (*way*) injuriously affect public interest, public health, public safety, public convenience, or any other finding except the mere will of the Commission that same will be surcharged." (page 39).

And again:

> "I am convinced the order of the Commission in this case is void on its face and of no effect, for two reasons: (1) Because there is neither found nor stated therein any reason, ground or justification for annulling and abrogating the contract between the parties, valid when made and in full force, effect and operation when the Public Utilities Commission came into existence as a creature of the state; (2) for the reason no facts are found or stated in the order of the Commission sustaining or tending to sustain the exercise of

its statutory powers and functions as prescribed in the Public Utilities Act; and further, no finding of the reasonableness or unreasonableness of the contract rates existing between the parties is made, and no finding is made showing or tending to show any discrimination between the contract rates and other rates of charge for service charged other members of the public, or other justification or excuse for the making of the order except the mere caprice or whim of the Commsision based on the ground the net revenues of intervener will be temporarily decreased if certain other changes in rates shall in future be made by the Commission" (page 39).

An examination of the Public Utility Law of the State of Kansas will, we think, show clearly that the Public Utilities Commission was authorized upon the facts stated in the pleadings to make the order in question and thereby to change the rates fixed by contract to be paid by appellant, and that the validity of the order of the Commission in nowise depends upon findings of fact set out in the order. The Public Utility Law of the State of Kansas was enacted in 1911, and the sections here quoted are from Chapter 238 of the Session Laws of 1911. The following sections of that act are deemed necessary to a decision of the case:

"Section 1. The Board of Railroad Commissioners of the State of Kansas is hereby constituted and created a Public Utilities Commission for the State of Kansas, and such commission is given full power, authority and jurisdiction to supervise and control the public

utilities and all common carriers, as hereinafter defined, doing business in the State of Kansas, and is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction.

Sec. 2. All laws relating to the powers, duties, authority and jurisdiction of the Board of Railroad Commissioners of the state are hereby adopted, and all powers, duties, authority and jurisdiction by said laws imposed and conferred upon the said Board of Railroad Commissioners, relating to common carriers, are hereby imposed and conferred upon the Commission created under the provisions of this act.

Sec 10. Every common carrier and public utility governed by the provisions of this act shall be required to furnish reasonably efficient and sufficient service, joint service and facilities for the use of any and all products or services rendered, furnished, supplied or produced by such public utility or common carrier and to establish just and reasonable rates, joint rates, fares, tolls, charges and exactions, and to make just and reasonable rules, classifications and regulations; and every unjust or unreasonable discriminatory or unduly preferential rule or regulation, classification, rate, joint rate, fare, toll or charge demanded, exacted or received is prohibited and hereby declared to be unlawful and void, and the Public Utilities Commission shall have the power, after notice and hearing of the interested parties, to require any common carriers and all public utilities governed by the provisions of this act to establish and maintain just and reasonable joint rates wherever the same are reasonably necessary to be put in, in order to maintain reasonably

sufficient and efficient service from such public utilities and common carriers.

Sec. 11. Every public utility and every common carrier doing business in Kansas, over which the Public Utilities Commission have control, shall publish and file with the Public Utilities Commission copies of all schedules and rates, joint rates, tolls, fares, charges, classifications and divisions of rates affecting Kansas traffic, either state or interstate, and shall furnish said Commission with copies of all rules, regulations and contracts between common carriers or public utilities pertaining to any and all service to be rendered by such public utility or common carrier. The Public Utility Commission shall have power to prescribe reasonable rules and regulations regarding the printing and filing of all schedules, tariffs, and classifications of all rates, joint rates, tolls, fares, charges and all rules and regulations of such public utilities and common carriers.

Sec. 12. No common carrier or public utility governed by the provisions of this act shall, knowingly or willfully, charge, demand, collect or receive a greater or less compensation for the same class of service performed by it within the state, or for any service in connection therewith, than is specified in the printed schedules or classifications, including schedules of joint rates; or demand, collect or receive any rate, joint rate, toll, fare or charge not specified in such schedule or classification; provided, that rates different from those specified in the printed schedule or classification of rates may be charged by any public utility, street or interurban railway, by agreement with the customer, in cases of charity, emergency, festivity or pub-

lic entertainment; provided, that any utility governed by the provisions of this act may grant to the officers, employees and agents of such utilities free or reduced rates or service upon like terms and in the same manner as is now provided by law relating to common carriers.

Sec. 13. It shall be the duty of the Commission, either upon complaint or upon its own initiative, to investigate all rates, joint rates, fares, tolls, charges and exactions, classifications or schedules of rates, or joint rates and rules and regulations, and if after full hearing and investigation the Commission shall find that such rates, joint rates, fares, tolls, charges or exactions, classifications or schedules of rates or joint rates, or rules and regulations, are unjust, unreasonable, unjustly discriminatory or unduly preferential, the Commission shall have power to fix and order substituted therefor such rate or rates, fares, tolls, charges, exactions, classifications or schedules of rates or joint rates and such rules and regulations as shall be just and reasonable. If upon any investigation it shall be found that any regulation, measurement, practice, act or service complained of is unjust, unreasonable, unreasonably inefficient, insufficient, unduly preferential, unjustly discriminatory, or otherwise in violation of any of the provisions of this act or of the orders of this Commission, or if it be found that any service is inadequate or that any reasonable service cannot be obtained, the Commission shall have power to substitute therefor such other regulations, measurements, practices, service or acts, and to make such order respecting any such charges in such regulations, measurements, practices, service or acts as shall be just and

reasonable. Whenever, in the judgment of the Public Utilities Commission, public necessity or convenience require, the Commission shall have power to establish just and reasonable concentration, commodity, transit or other special rates, charges or privileges, but all such rates, charges and privileges shall be opened to all users of a like kind of service under similar circumstances and conditions.

Sec. 14. Upon a complaint in writing made against any common carrier or public utility governed by the provisions of this act, by any mercantile, agricultural or manufacturing organization or society, or by any body politic or municipal organization, or by any taxpayer, firm, corporation or association, that any of the rates or joint rates, fares, tolls, charges, rules, regulations, classifications or schedules of such public utility or common carrier are in any respect unreasonable, unfair, unjust, unjustly discriminatory or unduly preferential, or both, or that any regulation, practice or act whatsoever affecting or relating to any service performed or to be performed by such public utility or common carrier for the public, is in any respect unreasonable, unfair, unjust, unreasonably inefficient, insufficient, unjustly discriminatory or unduly preferential, that any service performed or to be performed by such public utility or common carrier for the public is unreasonably inadequate, inefficient, unduly insufficient or cannot be obtained, the commissioners shall proceed, with or without notice, to make such investigation as they may deem necessary. The commissioners may, upon their own motion, and without any complaint being made, proceed to make such investigation, but no order affecting such rates,

joint rates, tolls, charges, rules, regulations and classifications, schedules, practices or acts complained of shall be made or entered by the Commission without a formal public hearing, of which due notice shall be given by the Commission to such public utility or common carrier or to such complainant or complainants, if any. Any public investigation or hearing which such Commission shall have power to make or to hold may be made or held before any one or more Commissioners, and all investigations, hearings, decisions and orders made by a Commissioner shall be deemed and held to be the investigations, hearings, decisions and orders of the Public Utilities Commission, when approved and filed by such Commission and filed in their office, and the Commission shall have power to require such public utilities and common carrier to make such improvements and do such acts are are or may be required by law to be done by such public utility or common carrier.

Sec. 15. Whenever notice shall be required by the provisions of this act to be given any common carrier or public utility governed by the provisions of this act, and the complainant, or either of them, thirty days' written or printed notice of the time and place when and where such investigation or hearing will be had shall be given, such notice to be served by mailing a copy thereof to the public utility or common carrier and complainant. Such notice shall embody in substance the complaint, if any, made against the public utility or common carrier upon which the hearing, investigation and decision of the Public Utilities Commission is requested or on which it will be given. The public utility

or common carrier, or the complainant or complainants, if any, shall be entitled to be heard and shall have process to enforce the attendance of witnesses and the production of books, papers, maps, contracts, reports and records of every description affecting the subject matter of the investigation. The Public Utilities Commission may, without præcipe or demand therefor, require the production of any books, papers, contracts, records or other documents in the possession of or under the control of the common carrier, public utility, complainant or complainants, affecting the subject matter of the controversy.

Sec. 16. If upon such hearing and investigation the rates, joint rates, fares, tolls, charges, rules, regulations, classifications, or schedules of such common carrier or public utility governed by the provisions of this act, are found to be unjust, unreasonable, unfair, unjustly discriminatory or unduly preferential, or in any wise in violation of the provisions of this act, or of any of the laws of the State of Kansas, the Public Utilities Commission shall have the power to fix and establish, and to order substituted therefor, such rates, joint rates, fares, tolls, charges, rules, regulations, classifications or schedules as it shall find, determine or decree to be just, reasonable and necessary; and if it shall be found that any regulation, practice or act whatsoever, relating to any service performed or to be performed by such public utility or common carrier for the public in any respect unreasonable, unjust, unfair, unreasonably inefficient, insufficient, unjustly discriminatory or unduly preferential, or otherwise in violation of any of the provisions of this act, or of

any of the laws of the State of Kansas, the Public Utilities Commission shall have full power, authority and jurisdiction to substitute therefor such other regulations, practice, service or act as they find and determine to be just, reasonable and necessary. All orders and decisions of the Public Utilities Commission whereby any rates, joint rates, fares, tolls, charges, rules, regulations, classifications, schedules, practice or acts relating to any service performed or to be performed by such public utility or common carrier for the public are altered, changed, modified, fixed or established, shall be reduced to writing, and a copy thereof, duly certified, shall be served on the public utility or common carrier affected thereby, by registered mail; and such order and decision shall become operative and effective within thirty days after such service, and such public utility or common carrier shall, unless an action is commenced in a court of proper jurisdiction to set aside the findings, orders and decisions of said Public Utilities Commission, or to review and correct the same, carry the provisions of said order into effect.

Sec. 20. Whenever any common carrier or public utility governed by the provisions of this act shall desire to make any change in any rate, joint rate, toll, charge or classification or schedule of charges, or in any rule or regulation or practice pertaining to the service or rates of any such public utility or common carrier, such public utility or common carrier shall file with the Public Utilities Commission a schedule showing the changes desired to be made and put in force by such public utility or common carrier, and such changes shall be plainly indicated by proper

reference marks in amendments or supplements to existing tariffs, schedules or classifications, or in new issues thereof. No change shall be made in any rate, toll, charge or classification or schedule of charges, joint rates, or in any rule or regulation or practice pertaining to the service or rates of any such public utility or common carrier, without the consent of the Commission, and within thirty days after such changes have been authorized by said Public Utilities Commission, then copies of all tariffs, schedules and classifications, and all rules and regulations, shall be filed in every station, office or depot of every such public utility and every common carrier in this state, for public inspection.

Sec. 21. Any common carrier or public utility governed by the provisions of this act, or other party in interest, being dissatisfied with any order of the Commission fixing any valuation, toll, rate, joint rate, fare, charge, or findings, rules or regulations, classifications, schedules, or any order or ruling fixing any regulations, practices or service, or order or ruling relating to the issuance of stocks, bonds or other securities hereinafter provided may, within thirty days from the making of such order, commence an action in a court of competent jurisdiction, against the Public Utilities Commission as defendant, to vacate and set aside any such order, finding or decision of the Public Utilities Commission on the ground that the valuation, toll, rate, joint rate, fare, charges, orders, rules, regulations, findings, classifications or schedules in such decisions are unlawful or unreasonable, or that any such regulation, valuation, practice or service fixed in such order or decision is unreasonable. All actions

brought under this section shall have precedence in any court, and, on motion, shall be advanced over any civil cause of a different nature pending in such court, and such action shall be tried and determined as other civil actions. Appeals from any decision of the District Court shall be taken from the District Court to the Supreme Court of the State of Kansas, in the same manner as provided by law in other civil actions. During the pendency of any action under the provisions of this act, all orders made by the Public Utilities Commission prescribing rates, joint rates, tolls, fares, charges, rules, regulations, classifications or schedules or findings shall, unless temporarily stayed or enjoined, remain in full force and effect until final judgment is rendered therein. During the pendency of such appeal the judgment of the lower court shall remain in effect, unless stayed by order of the Supreme Court. Service of summons on any member of the board shall be sufficient service on the board.

Sec. 30. Unless the Commission shall otherwise order, it shall be unlawful for any common carrier or public utility governed by the provisions of this act within this state to demand, collect or receive a greater compensation for any service than the charge fixed on the lowest schedule of rates for the same service on the first day of January, 1911.

Sec. 41. The provisions of this act and all grants of power, authority and jurisdiction herein made to the Commissioners, shall be liberally construed, and all incidental powers necessary to carry into effect the provisions of this act are hereby expressly granted to and conferred upon the Commissioners."

The Supreme Court of the State of Kansas in *State ex rel. Caster* v. *The Kansas Postal Telegraph Cable Company,* 96 Kans. 298, after citing some of the foregoing sections of the Public Utility Law, said:

> "It will be seen from the foregoing statutes that the legislature has promulgated a comprehensive program for the regulation and control of public service corporations. The Public Utilities Commission succeeding to all the powers conferred upon the State Board of Railroad Commissioners and by its own enlarged powers conferred by later enactments, has power to supervise the conduct of public service corporations in this commonwealth (page 303). * * *
>
> Continuing this examination of later enactments, we find the Commission vested with full power, authority and jurisdiction to supervise and control the public utilities and common carriers, and empowered to do all things necessary and convenient for the exercise of the power, authority and jurisdiction. That is to say, whatever power is necessary to the effectual exercise of the specific powers conferred is likewise conferred. (Utilities Act, Laws 1911, ch. 238, Sec. 1, 41.) And Sec. 2 of the Utilities Act virtually extends the power already given over railroads to public utilities (page 304). * * *
>
> Sec. 20 also is quite pertinent. It provides that if a public utility desires to change any rule, regulation or practice, it shall apply to the Commission for leave to change such practice, etc., and no change in such practice, etc., shall be made without the sanction of the Commission (page 305). * * *

> Neither do we discover the force of defendant's contention that Section 20 of the Utilities Act is void as sought to be applied in this case. What is it but a fair exercise of governmental authority, a method of procedure prescribed by law for the effective supervision of defendant's public service business?"

It may, therefore, confidently be said that the foregoing sections of the Public Utility Law delegate the state's power of supervision and control of public utilities to the Public Utilities Commission. Section 10 requires every public utility to furnish reasonably efficient service, to establish just and reasonable rates, and every unjust or unreasonably discriminatory rate is declared to be unlawful and void, and the Commission is given power to require all jublic utilities to establish and maintain just rates in order to maintain reasonably sufficient and efficient service. Section 11 requires every public utility to publish and file with the Commission copies of its schedules of rates. Section 12 provides that no utility shall charge, collect or receive a greater or less compensation for the same class of service performed by it within the state than is specified in its printed schedules.

The law then provides two separate and distinct methods by which rates of public utilities on file with the Commission may be changed or modified. Sections 13, 14, 15 and 16 provide the method to be pursued where the Commission upon complaint, or upon its own initiative, proceeds *against* a pub-

lic utility to investigate its rates, charges, exactions, etc. These sections provide for the giving of notice to the utility, a public hearing, and further provide that if the Commission finds that the utility's rates, charges or exactions are unjust, unreasonable, unjustly discriminatory, or unduly preferential, the Commission shall have power to fix and order substituted therefor such rates or schedules of rates as shall be just and reasonable. Section 16 provides that all orders and decisions of the Commission whereby rates, charges, schedules, etc., relating to any service performed or to be performed by a public utility are altered, changed, modified, fixed or established, shall be reduced to writing and a copy thereof duly certified shall be served on the public utility, and such order or decision shall become effective within utility itself. This section provides that a public utility shall, unless an action is commenced in a court of proper jurisdiction to set aside such order or decision, carry the said order into effect. As already stated, these sections last cited refer to proceedings instituted against a utility.

Section 20 of the law provides a method for changing existing rates upon the application of the utility itself. This section provides that a public utility desiring to make any change in its rates or schedules of charges, shall file with the Public Utilities Commission a schedule showing the changes desired to be made and put in force by the public utility. No change shall be made in any rate or schedule or charges without the consent

of the Commission. It will be noted that this section makes no provision for findings of fact by the Commission, it only requires the consent of the Commission to be obtained before the new rates or schedules go into effect.

Section 21 provides a method by which any party dissatisfied with any order of the Commission fixing rates, charges or schedules, may obtain a review thereof by a proper court to the extent only that the court may vacate the order if it be adjudged unlawful or unreasonable. This section requires the dissatisfied complainant to commence within thirty days after the making of the order an action in a court of competent jurisdiction against the Public Utilities Commission as defendant, to vacate and set aside the order, on the ground that the rates, charges or schedules "in such decisions are unlawful or unreasonable." The section further provides that all actions brought under this section shall be tried and determined as other civil actions. This means, as we understand it, that the burden of proof is upon the person bringing the action to establish his claim that the order of the Commission is unreasonable or unlawful. This would be the rule in any civil action. Furthermore, the Supreme Court of the State of Kansas has held that there is a presumption of validity and reasonableness attending the orders of the Commission. This was held in the case of *Union Pacific Railroad Company* v. *Public Utilities Commission*, 95 Kans. 604, l. c. 617. In that case the court held that

the plaintiff, railroad company, must carry the burden of showing that an order of the Commission was not just or reasonable. See also *State* v. *Missouri Pacific Railway Company*, 76 Kans., l. c. 495.

Section 18 of the Public Utility Law also undertakes to make the orders of the Commission *prima facie* reasonable. The section is as follows:

> "All orders, regulations, practices, services, rates, fares, charges, classifications, tolls, and joint rates fixed by the Commission shall be in force and effect on and after thirty days from the making thereof and expiration of thirty days after service aforesaid, shall be *prima facie* reasonable unless, or until, changed or modified by the Commission or in pursuance of proceedings instituted in court as provided in this act."

While the language of this section is not clear, it can at least be construed to mean that the orders of the Commission are *prima facie* reasonable when attacked in a direct proceeding instituted in court as provided in the act.

A critical examination of the foregoing sections of the law show that there is no requirement that the Utilities Commission in changing existing rates of public utilities must make findings of fact or give any reason in the order itself for the conclusion or decision of the Commission. The only provision as to the form of the order is contained in Section 16, which says that the order shall be reduced to writing and a

copy thereof served on the public utility affected thereby. Section 20, which expressly authorizes the procedure under which the public utility may apply for authority to change its existing rates, only requires the consent of the Commission. These sections, of course, do not vest in the Commission any arbitrary power to change existing rates in an unreasonable or an unlawful way, either on its own motion or upon the application of a consumer or of the public utility itself. It is our understanding, however, that the legislature of the State of Kansas, as was stated in *State* v. *Postal Telegraph Cable Company, supra*, has by this law established a comprehensive program for the regulation and control of public service corporations. That the orders of the Commission are subject to the scrutiny of the courts but are only to be set aside on the ground that the orders are unlawful or unreasonable, and unless the court upon an investigation of the evidence introduced before the Commission can find that the order is unlawful or unreasonable, the order must stand, for the courts have no power to substitute their judgment as to reasonable rates in place of the judgment of the Commission.

In the case of *State* v. *Missouri Pacific Railway Company*, 76 Kans., 467, the court said:

> "There is nothing substantial in the contention that the statute authorizes the court to try the whole controversy and make such orders as it may deem reasonable and just, and that the order when reviewed and revised becomes a judicial order. This court is not given

> authority by the act to make any rule, order or regulation, its authority is limited to the inquiry whether the order already issued is reasonable and just."

This language is quoted with approval in *Union Pacific Railroad Company* v. *Public Utilities Commission,* 95 Kans., l. c. 614, and in *State ex rel. Caster* v. *Kansas Postal Telegraph Cable Company,* 96 Kans., l. c. 307.

Appellant, proceeding under the provisions of Section 21, within thirty days from the making of the order in question commenced this action in the United States District Court for the purpose of having the order vacated. It is our contention that the only question presented to the court in this proceeding was to determine whether or not the order was unlawful or unreasonable. We think it sufficiently appears from the foregoing sections of the Public Utility Law that this order is not *unlawful* upon its face. That to determine whether or not it was *unreasonable* the trial court must have considered the evidence introduced before the Commission. Upon this question the form of the order was not conclusive but the court must of necessity be advised of the evidence upon which the Commission acted, and determine from that evidence whether existing rates were unreasonable, and also whether the new rate was reasonable. It is our contention that the trial court could not intelligently determine from the

pleadings that the order of the Commission was either unlawful or unreasonable.

State v. *Mo. Pac. Ry. Co.*, 76 Kans., l. c. 491.

III.

Validity of the order should depend upon the evidence and not on the form of the order.

Assuming, for the purpose of this argument only, that the provisions of Sections 12, 13, 14 and 15, apply to this proceeding, and that the Commission in order to change the rates fixed in appellee's contract must have reached the conclusion that these rates were unjustly or unreasonably low or discriminatory or unduly preferential, we here review briefly the allegations of the pleadings, which in so far as the motion for judgment on the pleadings is concerned, are admitted to be true. The important allegations are that the Public Utilities Commission is vested with full power, authority and jurisdiction to supervise and control public utilities doing business in the State of Kansas and to fix and regulate rates. On May 2, 1910, appellant Kansas Gas & Electric Company, and appellee entered into a contract fixing rates for service for a period ending November 30, 1930. Prior to March 25, 1918, appellant Kansas Gas & Electric Company, filed its application with the Commission for authority to add a surcharge to its existing rates for electricity. The application stated that existing rates were based upon the cost of producing and distributing electrical energy

in normal times and were intended to and did yield the company a reasonable return only on the fair value of its property. That on account of the unusual conditions due to the war, the cost of producing and distributing electrical energy had increased enormously on account of the increased cost of fuel and labor. That if existing rates were continued in effect under conditions then existing, the result would be to deprive defendant of a reasonable return upon the value of its property. The application alleged that the cost of producing electricity for the year ending December 31, 1917, was approximately 100 per cent greater than the cost of production in 1914. That on account of such increase the net income of the company was for the year ending December 31, 1917, approximately $190,000.00 less than it would have been if the company had operated under normal conditions. That if the existing rates were continued in effect, the result would be to deprive the company of a reasonable return upon the value of its property, making it impossible to market its securities, which must be sold in order to provide funds with which to make necessary improvements and to furnish proper and adequate service. The application contained the schedule of increased rates, consisting of a surcharge to be added to the rates to large consumers of electricity. Upon filing the application the Public Utilities Commission, after due notice to all parties concerned, including the appellant, entered upon a hearing of the application. That the appellant was present and participated at the hearing. That

evidence was introduced in support of and in opposition to the application, and that the Commission after full investigation and being fully advised in the premises entered its order by the terms of which it found that the appellant should be authorized and permitted to add to its existing rates the surcharge set out in the order, and further authorized appellant to add the said surcharge to its existing rates. That said order has not been revoked nor modified.

It thus appears from the pleadings that the application was based on allegation to the effect that existing rates were unreasonably low; and as the order carries a presumption of validity and the burden of proof is upon the appellant to show that the order was unreasonable or unlawful, it must be presumed for the purpose of a motion for a judgment on the pleadings that the Commission found the facts stated in the application to be true The applicant had no control over the form of the order made by the Commission, its only duty was to introduce the necessary evidence before the Commission to authorize an order permitting it to charge reasonable rates. We therefore contend that its right to enforce these rates must be determined, not by the form of the order made by the Commission but by the evidence which was introduced to support the order. The motion for a judgment on the pleadings should therefore have been overruled.

IV.

The Public Utilities Commission is not a court.

An examination of the opinion of the trial court indicates that the court considered that the Public Utilities Commission in making the order in question was acting in some sense as a court. The court in reaching the conclusion that the Commission in its order should have found facts to sustain the exercise of the Commission's statutory powers, cited the case of *Carron* v. *Martin*, 26 N. J. Law, 594; 69 Am. Dec. 584; in which it was said:

> "Tribunals with special powers for adjudicating in particular cases, under the various names of commissioner, surveyors, appraisers, committees, directors, overseers, and the like, little or in nowise relating to the general administration of justice, whose mode of proceeding are prescribed in the statutes by which they are created, are of a different class (from courts of general jurisdiction); and unless their proceedings on the face of them show a compliance with the directions required by the statute under which they act, it never could be known whether they acted within their jurisdiction or exceeded it."

An examination of this case will show that the tribunal in question was the city council of Newark, New Jersey, and that the council was acting judicially or quasi judicially.

The trial court also cited the case of *Commissioners* v. *Johnson*, 39 So. 910, and quoted from

the opinion of the Supreme Court of Alabama as follows:

> "The commissioners' court, in the exercise of statutory powers, as were conferred by the act in question, *is a court of limited jurisdiction* (*italics ours*), and to uphold its proceedings under the statute its records must affirmatively show the existence of the facts upon which its authority rests."

The trial court further quoted from the opinion in the cases of *Detroit, etc., Railroad* v. *Railroad Commission,* 171 Mich. 335, 137 N. W. 329, 333, as follows:

> "The legislature has not fixed the freight rates to be charged by complainant beyond this: It has prohibited and made unlawful every unjust and unreasonable charge. It permits reasonable and just rates to be charged for services performed. It has confided to the Michigan Railroad Commission the power, with the duty, to ascertain, in proper cases whether a rate is reasonable and just or unreasonable and unjust, and to thereupon make an order in conformity with the facts. The facts being found, it is the legislature which speaks, approvingly or disapprovingly, as the case may be. The important business of the Commission with respect to rates is ascertaining facts. Its findings are not conclusive, but have the effect of establishing *prima facie* that the rates considered are reasonable and just and therefore lawful, or are unreasonable and unjust and unlawful."

Evidently the trial court did not have an opportunity to read all of the opinion of the Michigan court. After the passage above quoted, the opinion proceeds as follows:

> "Its orders stand until modified or set aside by it or by the courts. The duty of the courts in the premises is not essentially different from that of the Commission. No different conclusion was stated in *Michigan Central R. Co.* v. *Wayne Circuit Judge*, 156 Mich. 459 (120 N. W. 1073, 16 Am. & Eng. Ann. Cas. 832). It is only after determining that the rate fixed by the Commission is unreasonable that the court may set it aside. Presumptively, the findings and orders of the Commission are right. If attacked, the complainant has the burden of showing 'by clear and satisfactory evidence that the order of the Commission complained of is unlawful or unreasonable, as the case may be.'
>
> The difficulty and perplexity of such an inquiry would deter any one, to whom the task was not a duty, from pursuing it, in the first instance, and from reviewing a determination once made. *It is unfortunate that the courts do not have the assistance which would be derived from a finding made by the Commission which would distinctly state the ultimate facts found and the factors, at least the controlling factors, considered in determining whether a rate was or was not reasonable.* (Italics ours.) We notice, in this connection, that in returning the testimony to the Circuit Court the Commission states that its original conclusions are confirmed by a personal examination of the locality in which the service of complainant is performed, and by knowledge acquired independent of the testimony pro-

> duced before it. Manifestly, this court cannot share in knowledge so acquired, unless evidence of the facts discovered, or supposed to have been discovered, is in some way brought upon the record."

The Michigan court thereupon considered the testimony introduced before the Commission, and found the order of the Commission to be a just one; the court at the conclusion of the opinion, saying:

> "We repeat that the rates made by the Commission are *prima facie* reasonable and just. They must be shown to be unjust and unreasonable. Indulging the statute presumption we are unwilling to hold that the rate prescribed by the Commission is unreasonable (page 365)."

It is apparent, therefore, from the Michigan case that that court, while it held that the important duty of the Commission was to ascertain facts, nevertheless found that it was not the duty of the Commission to state these ultimate facts in its order.

V.

The Commission an Administrative Board.

The view adopted by the trial court that the Public Utilities Commission must make findings of fact in order to give validity to an order of the kind here in question, must be based upon the assumption that the commission is a judicial tribunal

or at least one exercising judicial powers. If the power to determine the reasonableness of existing rates and to set aside unreasonable rates is not judicial, then the authorities cited in the court's opinion as well as those referred to in appellant's argument, are not in point. We think the question is disposed of by the Supreme Court of Kansas in the case of *State* v. *Missouri Pacific Railway Company*, 76 Kans. 467. It is true that the court in that case had before it for consideration the Kansas statute establishing the Board of Railway Commissioners. However, the present Public Utilities Commission has succeeded to all the powers of the old Board of Railroad Commissioners (Sec. 2, ch. 238, Session Laws 1911), and the decision of the court is applicable to the present Public Utilities Commission.

That was an original proceeding in mandamus brought in the Supreme Court of Kansas, at the relation of the attorney for the Board of Railroad Commissioners to compel the railroad company to obey an order of that board requiring it to install and operate passenger train service on a branch of the defendant's railway. The defendant attacked the constitutionality of the law creating the Board, on the ground that the law attempted to delegate to the board legislative authority. The court, in its opinion, referred to the fact that the power to create commissions to regulate and control the operation of common carriers and to fix rates for the transportation of passengers and freight, and to hear and determine complaints

against the carriers has been repeatedly recognized and upheld by the Supreme Court of the United States. The Kansas court held that while the legislative power cannot be delegated, nevertheless the absolute independence of the three departments of government is impracticable, and was not intended by the Constitution of Kansas. The court distinguished the law establishing the Board of Railway Commissioners from the Court of Visitation Law which had been held unconstitutional (*State* v. *Johnson*, 61 Kans. 803), and held that the objections which had been urged against the latter law, were not applicable to the former. The court said:

> "The power conferred is uniformly held to be administrative in its character, though the term 'executive' has been used by the Supreme Court of the United States in defining it. It has, however, no relation to or dependence upon the executive power spoken of as one of the three governmental powers, for its function is that of carrying into effect the legislative will, and in its operation it is a part of the legislative act (p. 476)."

The court then quotes the following language from Justice Brewer in *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, l. c. 394, 38 L. ed. 1014, l. c. 1022:

> "Such a commission is merely an administrative board created by the state for carrying into effect the will of the state as expressed by its legislation. Railroad Commission Cases, 116 U. S. 307, 6 Sup. Ct. 334, 348, 349, 29

> L. ed. 636. No valid objection, therefore, can be made on account of the general features of this act; those by which the state has created the Railroad Commission and intrusted it with the duty of prescribing rates of fares and freights as well as other regulations for the management of the railroads of the state."

The Supreme Court of Kansas, therefore, in disposing of this objection to the law, held that the power of the legislature to delegate merely administrative functions in this manner, is no longer an open question, and such power clearly exists.

The further contention was made in the Missouri Pacific case by the defendant that the act was void because it conferred upon the Board of Railway Commissioners a combination of *legislative*, *executive* and *judicial* powers. The court in disposing of this objection, first laid down the elementary proposition that every statute is presumed to be constitutional, and that no act of the legislature should be held unconstitutional unless its vice is apparent. The court then considered Sections 4 and 9, of Chapter 340, of the Laws of 1905, the provisions of which were asserted by the defendant to combine executive, legislative and judicial power in the board of Commissioners.

A portion of Section 4 is as follows:

> "It shall be the duty of said board, from time to time, to alter, change or amend any such schedule, classification, rate, rule or regulation established by any railroad company or companies which the board, upon complaint as hereinafter provided, may find to be un-

reasonable, unjust, or discriminative; and such amended, altered or new schedule, classification, or rate, rule, or regulation, shall be put into effect by such railroad company or companies within not more than thirty days after receiving written notices of the order of the board; provided, that before such order is made by the board notice and a hearing shall be given as required in Section 9 of this act."

That part of Section 9 describing the procedure before the Railroad Commission is as follows:

"Before proceeding with such hearing the board shall give to the complainants and railroad company ten days' notice in writing of the time and place of entering upon same. Such complaint shall be heard in an informal manner, without further pleadings, and under such rules and regulations as the board may from time to time provide in order to secure a speedy hearing and an equitable determination of the questions involved. The attorney for the Board of Railroad Commissioners shall appear at such hearing on behalf of the complainant or complainants, and the complainant or complainants may, if they desire, employ other counsel to assist in the preparation and hearing of any such complaint. If upon such hearing it shall appear to said Commissioners that the complaint is well founded, and that any material matters alleged are true, they shall so adjudge, and shall find and decide what are reasonable tariff charges, classifications, rules and regulations respecting the matters involved, and respecting the same matters on the entire line of such railroad in this state."

The court held that the functions of the Board of Railway Commissioners under this act are clearly administrative; and the fact that in the performance of these functions the court must hear complaints and determine them does not make their acts judicial. The court said:

> "Where judgment or discretion is exercised as a mere incident to a ministerial power it has never been held to be the exercise of judicial power within the meaning of constitutions which, like ours, provide for the separation of the three departments of government (*Owners of Landis* v. *The People ex rel.*, 113 Ill. 296; *Rich et al.* v. *City of Chicago*, 59 Ill. 286, 295). In fact the cases we have quoted from sustaining the power of legislatures to create boards of this character, and to confer upon them power to regulate and control common carriers, afford a sufficient answer to the contention that the power conferred is either legislative, executive or judicial (page 484)."

Said Sections 4 and 9 of Chapter 340, Laws of 1905, have been carried forward (with amendments immaterial to the question in hand) and retained in the law governing proceedings before the Public Utility Commission with reference to rates to be charged by railroad companies. Said Section 4 is now Section 8390, and Section 9 is now Section 8416, of the General Statutes of Kansas of 1915, so that the decision in the Missouri Pacific case really construes the powers of the Public Utilities Commission under the present statute. Furthermore, the provisions of Section

13 of the Public Utilities Law above quoted providing for the institution by the Commission, either upon complaint or on its own initiative of proceedings, to investigate rates of a public utility have not substantially changed the foregoing sections of the Railroad Commission Law as to the power of the Commission to pass upon and declare present rates unreasonable and discriminatory and to order others substituted in lieu thereof. An examination of these statutes will show that their provisions are almost identical and substantially the same.

The Supreme Court of Kansas having held that the power of a board to determine that existing rates are unreasonable and to substitute in lieu thereof reasonable rates is not a judicial function, such decision is binding upon the Federal Court in this case.

Hunter v. *Pittsburg*, 207 U. S. 161, 52 L. ed. 151.
Old Colony Trust Co. v. *Omaha*, 230 U. S. 100, 57 L. ed. 1416.

VI.

Statutory provision concerning form of Commission's orders.

Counsel for appellant, in support of the contention that findings of fact should have been made by the Public Utilities Commission, cite *Public Utilities Commission* v. *Springfield Gas Company*, 291 Ill. 209, and *Public Utilities Com-*

pany v. *B. & O. S. W. R. R. Co.*, 281 Ill. 405. These cases are not in point for the reason that Section 65 of Chapter 111a Revised Statutes of Illinois 1917 (Public Utility Act) requires the Commission of that state to make and render "findings concerning the subject matter and facts inquired into, and enter its order based thereon."

Decisions of the Supreme Court of the United States holding that findings must be made by the Interstate Commerce Commission and decisions of courts construing the Missouri Public Utility Act are also not in point for the reason that the Interstate Commerce Law (Section 8582 U. S. Compiled Statutes 1918) expressly provides that the Interstate Commerce Commission shall make findings of fact in certain cases, and the statute creating the Missouri Commission expressly provides that findings of fact shall be made (Subsection 2, Section 29, Laws of Missouri, 1913, page 616).

The Public Utility Law of Kansas makes no such requirement with reference to the orders of the Kansas Public Utility Commission. The law simply provides that all orders and decisions "shall be reduced to writing and a copy thereof duly certified shall be served on the public utility or common carrier affected thereby, by registered mail" (Section 16).

The Circuit Court of Appeals ruled correctly upon this contention as follows:

> "That the Commission, when making the order complained of, made no special findings of fact, is wholly immaterial as there is nothing in the act creating the Commission and defining its duties and powers requiring it." (Transcript, page 59.)

VII.

Record Shows Jurisdictional Facts.

Even if the Kansas Public Utilities Commission was a tribunal of limited jurisdiction and its orders subject to the rule that the record should affirmatively show that it had jurisdiction to make the order in question, still all necessary jurisdictional facts were stated in the application of the Electric Company to the Commission and that application is as much a part of the record as the order itself. On this point the Circuit Court of Appeals said:

> "It is next contended that the order of the Commission does not state facts necessary to show that it had jurisdiction, and the rule that when a special tribunal, created with special powers to act, not in conformity with the rules governing actions at common law *inter partes*, the record must show all the facts necessary to establish jurisdiction is invoked. But the petition of the Gas & Electric Co. to the Commission, is as much a part of the record as the order, and it contains all the allegations necessary for the Commis-

sion to act in the matter. The petition is a part of the record. The allegations in the petition determine the jurisdiction. *Hartford Life Ins. Co.* v. *Johnson*, decided June 28, 1920." (Transcript of Record, page 59.)

VIII.

Under the Kansas Statute findings of fact by the Commission would be useless.

It cannot be contended that the appellant in this case has in any way been prejudiced or injured by the failure of the Commission to make findings of fact. The Commission is not a court, it has no power to put its orders into effect except through the assistance of a court, and before any order made by it can be enforced, such order must first have passed judicial scrutiny concerning its reasonableness. Section 21 of the Public Utility Law gives the plaintiff the right to commence an action in any court of competent jurisdiction to vacate the order. This action was begun by the plaintiff within thirty days from the date of the making of the order, the plaintiff was at liberty to urge any objection that it had to make against the validity of the order, and it has done so in this case. Its rights in this court are in no wise limited or curtailed because no findings of fact were made by the Commission; and if such findings had been made they would in no wise affect the jurisdiction or action of the reviewing court.

The Kansas statute does not provide for reviewing findings of fact. The statute provides for a

trial *de novo*. Neither party is limited to or bound by the facts, if any, found by the Commission, but may introduce any evidence tending to show that the order is either reasonable or unreasonable, lawful or unlawful. That this was the procedure to be followed under the Kansas statute as understood by appellant's counsel is evident from the provisions of the stipulation which was entered into in this case appearing at page 26 of the transcript, as follows:

> "It is further stipulated and agreed that upon the final hearing in the above entitled cause, which shall be at the earliest convenience of the court, the transcript of the evidence taken before the Public Utilities Commission at the hearing of the application for said surcharge may be used by either side, subject to objection as to competency, relevancy or materiality, and either side may introduce such further competent, relevant and material evidence as it may desire."

Under this procedure authorized by statute and concurred in by appellant's counsel by stipulation, the making of findings of facts by the Commission would have been a useless ceremony.

IX.

Purpose of Order Was to Increase Rates.

The trial court gave as one reason for the invalidity of the order of the Commission as applied to appellant, the failure of the Commission to find that there was any discrimination between

the rate fixed in the contract and other rates charged other members of the public (Trans. 39). We submit that no such finding was necessary for the reason that the order was not based upon any such discrimination. An examination of the order and of the facts stated in the pleadings shows that the order was not made to remove a discrimination existing between appellant and other consumers but was made to increase the rate of large consumers of electricity, including appellant, who happened to be in the class affected by the surcharge order. Under the provisions of Section 12 of the Public Utility Law above quoted it was the duty of the Electric Company to collect the rates fixed in the order from all consumers affected by it. To have increased the rates to other consumers not having contracts without making a similar increase to appellant would have caused discrimination in favor of the latter. The authorities cited above establish the doctrine that appellant stands in no better position than other consumers of its class, by reason of its contract.

X.

The order of the Commission classified consumers and no special reference to appellant's contract was necessary.

The Commission heard and considered the Electric Company's application for permission to add surcharges to its existing rates to power consumers. Appellant was notified of the hearing and was present and participated. After a full investigation

the Commission entered its order finding that the Electric Company should be authorized to add to its existing rates the schedule set out in the order. It classified the power consumers and fixed a surcharge to be added to the existing rates of consumers in each class. Appellant fell into one of these classes, and the effect of the order was to increase its rate until the further order of the Commission.

Counsel for the appellant appear to be of the opinion that this order could not be made effective against the appellant without special reference being made in the order to appellant's contract. This is not the law. In both the Union Dry Goods Company case and the Kansas City Bolt and Nut Company case, *supra*, the orders of the respective commissions were orders establishing a general schedule of rates and no special reference was made in the orders to the contracts of the plaintiffs. In the case of *Louisville & N. R. Co.* v. *Dickerson* the Circuit Court of Appeals for the Sixth Circuit, in referring to rates filed by a common carrier with the Interstate Commerce Commission, said:

> "The cardinal purpose of the provisions of the public establishment of tariff rates is to secure uniformity, reasonableness and certainty of charges for service. A rate once regularly published is no longer merely the rate imposed by the carrier, but becomes the rate imposed by law; and routes and rates once so established become a matter of public right and forbid private contracts inconsistent therewith." (191 Fed. Rep. l. c. 709.)

The Circuit Court of Appeals in its opinion in this case said:

> "The Commission made no order against the Railroad and Light Company; there is nothing in the order referring to any contract in existence; all the order attempts to do and does is to classify the customers of the Gas and Electric Company and allow a surcharge on three of the four classes in which they are divided; that the Commission has under the law creating it authority to classify customers, is not questioned, nor can it well be." (Trans., p. 57.)

XI.

The Circuit Court of Appeals did not commit error in dismissing the complaint.

Counsel specify as error the action of the Circuit Court of Appeals in directing the District Court to dismiss the complaint instead of remanding the case for trial upon the merits.

But appellant submitted the case on its motion for judgment on the pleadings. In this motion it recited:

> "Wherefore, plaintiff shows that the diversity of citizenship between the parties to this cause being admitted, and the amount in controversy being admitted to exceed three thousand dollars, exclusive of interest and costs, and it being admitted in this case that the final and determining isssue is the binding effect upon this plaintiff of said order of said Commission as above set forth, and it appearing

> from inspection of said order that the same is wholly void, insufficient, invalid and without binding effect, the necessity for extended hearing, and the introduction of voluminous, tedious and complicated evidence and proof is wholly unnecessary under the state of the pleadings in this cause of record appearing in this court, and in presenting its motion, plaintiff saves and reserves to itself all of its rights in the presentation of evidence and proofs and hearing upon the merits of the issues of fact and law, otherwise than as above stated, involved in this cause, in the event it should be determined that final judgment and decree should not be entered pursuant to this motion and a similar motion filed herein by plaintiff against defendant, The Public Utilities Commission of the State of Kansas." (Trans., p. 31.)

True, appellant in said motion attempted to reserve the right to present evidence at a hearing on the merits should its motion be overruled. The Circuit Court of Appeals rightly held in effect that the attempted reservation was ineffective in view of the submission of the cause to the trial court for final judgment on the pleadings and in view of appellant's admissions in its motion for judgment, wherein it asserted that all necessary facts appeared upon the face of the order complained of or were admitted by the pleadings. So that the introduction of evidence and proof was wholly unnecessary. The cause having been thus submitted and the record containing the admissions noted, the direction to dismiss the bill of complaint followed.

XII.

No Federal Question Presented.

Appellees have filed a motion to dismiss the appeal in this cause or to affirm the judgment of the United States Circuit Court of Appeals for the reason that no real or substantial federal question is presented by the bill of complaint or by the record. That no federal question is relied on appears from an examination of the specification of errors contained in appellant's brief as well as from the argument of appellant's counsel.

Under the rule of this court errors not specified will be disregarded. In appellant's specification of errors no reference is made to any error on the part of the Circuit Court of Appeals in deciding any constitutional or federal question. No reference whatever is made to the fifth or fourteenth amendments to the Constitution. The third and sixth specifications (pages 17 and 18, appellant's brief) do not question the power of the Kansas Public Utilities Commission to change rates fixed by contract between the parties. That this power exists is admitted by counsel for appellant in their brief (page 61). It seems apparent, therefore, both from appellant's specification of errors and from the brief and argument of its counsel that no constitutional or federal question is relied upon here, the evident purpose of this appeal being to obtain a review of questions which were passed upon by the Circuit Court of Appeals and which were exclusively within the jurisdiction of that court.

Appellant is not now asserting as it did assert in its bill of complaint (Trans., p. 4) that the contract rates were protected by the provisions of Section 10, Article I, of the Constitution, and that the state in the exercise of its police power could not change these rates. On the contrary, appellant in its assignment of errors, Paragraph II, Section L (page 98), admits the power of the Public Utilities Commission "in a proper case, upon proper claim, pleadings, showings and findings," to set aside contract rates in the exercise of the police powers of the state. The assignment of errors, therefore, presents no question involving the application of Section 10 of Article I of the Constitution.

It is further to be noted that the trial court in its opinion holding void the order of the Commission, expressly held against appellant's contention that the contract rate was protected by the provisions of Section 10, Article I, of the Constitution (page 37). The decree sustained appellant's motion for judgment on the pleadings for two reasons, both of which are set out in the decree, and neither of which involves any federal question (page 43).

Appellant did not appeal from the decree of the District Court, and is, therefore, precluded from complaining here of the action of the trial court in holding that the rates fixed in the contract were subject to change by the state in the exercise of its police power. (*Landram* v. *Gordon*, 203 U. S.

56, 51 L. ed. 88; *Southern Pine Lumber Company* v. *Ward*, 208 U. S. 126, 52 L. ed. 427.) The appeal should be dismissed or the judgment of the Circuit Court of Appeals affirmed.

Respectfuly submitted,

A. E. HELM,
Counsel for the Public Utilities Commission of the State of Kansas, Appellee.

H. L. MCCUNE,
Counsel for Kansas Gas and Electric Company, Appellee.

WICHITA RAILROAD & LIGHT COMPANY *v.* PUBLIC UTILITIES COMMISSION OF THE STATE OF KANSAS ET AL.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 27. Argued April 24, 1922.—Decided November 13, 1922.

1. Jurisdiction acquired by the District Court on the ground of diverse citizenship, is not divested by the intervention, by leave of the court, of a party, opposed to and of like citizenship with the plaintiff, but whose presence is not essential to a decision of the original controversy. P. 53.
2. The jurisdiction of the District Court arising from diverse citizenship extends to the entire suit, and to every question, state or federal, involved in its determination. P. 54.
3. Where a plaintiff in equity successfully moves the District Court for judgment on the pleadings, reserving the right to adduce evidence and be heard on issues of mixed law and fact presented, a decree of the Circuit Court of Appeals, reversing the decree in his favor, should accord that opportunity, and not dismiss the bill. P. 54.
4. Under the Public Utility Law of Kansas, Laws 1911, c. 238, in order that an increase of rates, proposed by a gas company, may supersede lower rates fixed by its contract with another, it is not enough that the change be filed with and consented to by the Commission, under § 20; there must, under § 13, be an express finding by the Commission, after full hearing and investigation, that the existing rates are unjust, unreasonable, unjustly discriminatory, or unduly preferential; and without such finding the Commission's order is void. P. 56.

5. Such a finding may not be supplied by inference and reference to the averments of the petition invoking the action of the Commission. P. 59.

6. Delegation of pure legislative power is against constitutional principle; therefore, administrative agencies granted authority over rates are enjoined to follow designated procedure and rules of decision as a condition to the validity of their action. P. 58.

268 Fed. 37, reversed.

The Wichita Railroad & Light Company, a corporation of West Virginia, is an electric street railroad and light-furnishing company doing business in Wichita, Kansas, and will be known as the Wichita Company. The Kansas Gas and Electric Company, also a West Virginia corporation, and to be known as the Kansas Company, is engaged in the business of furnishing electric light and power to consumers in Kansas. In 1910, the two companies made a contract by which the Kansas Company agreed to furnish and the Wichita Company agreed to accept and pay for electrical energy, at certain rates, until 1930; and the contract was fulfilled by both until 1918. Then the Kansas Company filed a petition with the Public Utilities Commission of Kansas, to be known as the Commission, in which it alleged that, on account of the increase in the cost of production and distribution,

"the net income of your petitioner for the year ending December 31, 1917, was approximately $190,000 less than it would and should have been if your petitioner had been able to operate under the normal conditions that existed in 1914, at which time its said rates were first installed as aforesaid; that if said rates are continued in effect hereafter the result thereof will be disastrous to your petitioner, depriving it of a reasonable return upon the value of its said property, and making it impossible to find a market for the securities it must issue and sell in order to provide funds with which to make improvements,

additions and betterments which are necessary, if it is to furnish proper and adequate service to the communities in which it operates."

The petition further recited that in December, 1916, being of opinion that it could reduce its rates for residential and commercial lighting, it proposed a gradual reduction and filed a schedule for the purpose, which the Commission had not acted on, that in January, 1917, it did reduce its rates, but that, if a further reduction under the schedule for 1918 were made, the loss of net earnings to the petitioner would be $220,000.

The petition continued:

"Your petitioner is of the opinion that in order to meet this situation, and in order to increase the net earnings of your petitioner in an amount sufficient to offset the loss resulting to it from the conditions above stated, an order should be entered by the Commission authorizing petitioner to add to its existing rates the surcharge hereinafter set out. There are approximately 19,900 consumers now served by your petitioner; the proposed surcharge does not affect consumers using 100 kilowatt hours or less per month, and, therefore, 17,000 of said total of 19,900 consumers are not affected. In apportioning the surcharge equitably among the remainder of said consumers, your petitioner has taken into consideration the fact that in the generation of electrical energy for large power consumers fuel is approximately 75 per cent of the cost of the generation, and that, therefore, a surcharge which has for its purpose the reimbursement of the utility company for increase in the cost of fuel, should be so adjusted that the surcharge should increase in proportion to the amount of energy consumed. The percentage of increase fixed by such surcharge over existing rates is, therefore, increased in proportion to the amount of consumption. The last

step in said surcharge schedule affects 6 consumers, and the last two steps 38 consumers.

"Wherefore, your petitioner asks that an order be made by your Honorable Commission authorizing your petitioner to add to its existing rates for electricity in the State of Kansas, and until the further order of the Commission the following surcharges:

For the first 100 kwh per month, no surcharge.

For the next 1,000 kwh per month, 12 mills net per kwh.

For the next 10,000 kwh per month, 9.5 mills net per kwh.

For the next 1,000,000 kwh per month, 8. mills net per kwh.

For all excess kwh per month, 3.5 mills net per kwh."

The order of the Commission upon this petition recited that it "came duly on for order by the Commission upon the pleadings of the respective parties and the evidence introduced thereunder; and the Commission upon consideration of said pleadings and evidence and being duly advised in the premises, finds that the Kansas Gas & Electric Company should be authorized and permitted to add to its existing rates for electricity supplied by it to consumers in the State of Kansas, until the further order of the Commission, the following net surcharge:

For the first 100 kwh per month, no surcharge.

For the next 14,900 kwh per month, 1 mill surcharge per kwh.

For the next 20,000 kwh per month, 2 mills surcharge per kwh.

For all excess over 35,000 kwh per month, 3 mills surcharge per kwh."

The rates thus fixed were substantially higher than the contract rates.

The Wichita Company, thereupon, filed a bill in equity in the United States District Court for Kansas seeking to

enjoin the Commission from putting the new rates in force as against it. After averring the diverse citizenship of the parties and a sufficient jurisdictional amount involved, the bill alleged that the order impaired the contract which it had with the Kansas Company, in violation of Article I, § 10 of the Federal Constitution, that the rates fixed were unjust and unjustly discriminatory as against the complainant, that it was the largest customer of the Kansas Company, and that the increase of its rate as compared with that of others violated every equitable rule of rate-making and deprived the plaintiff of its property without due process, and denied it the equal protection of the laws, in violation of the Fourteenth Amendment. A temporary injunction was issued. The answer of the Commission averred that the proceedings were regular and authorized by the statute of Kansas, that the Wichita Company had participated in them, and denied that the surcharges were discriminatory or unjust. The Kansas Company then applied for leave to intervene, and leave was granted. It answered the bill much as the Commission did, but with more elaboration, denying that the order was discriminatory or unjust, and averring that the contract of 1910 was necessarily subject to the legitimate exercise of the police power of the State, and that an order of the Commission regularly made in the exercise of that power could not be regarded as working an impairment of the obligation of the contract in the sense of the contract clause of the Federal Constitution.

The Wichita Company made a motion for judgment on the pleadings, on the ground that the order of the Commission was void on its face, but saved and reserved to itself "all of its rights in the presentation of evidence and proof and hearing upon the merits of the issues of fact and law otherwise than as above stated, involved in this

cause, in the event it should be determined that final judgment and decree should not be entered pursuant to this motion."

The District Court gave judgment for the Wichita Company on the pleadings and enjoined the Commission and the Kansas Company from putting into force the increased rates. The Circuit Court of Appeals reversed the decree of the District Court and directed a dismissal of the bill, Judge Sanborn dissenting.

The Wichita Company has appealed to this Court.

Mr. Henry I. Green, with whom *Mr. Thomas F. Doran* was on the briefs, for appellant.

Mr. H. L. McCune, with whom *Mr. A. E. Helm* was on the briefs, for appellees.

Mr. Chief Justice Taft, after stating the case as above, delivered the opinion of the Court.

The appellees urge that the concession of the appellant that contracts in respect to the rates to be charged by a public utility are subject to suspension or abrogation by the police power of the State validly exercised through an administrative agency takes out of this case any federal question, because the issue then is only a state question, to wit, whether, under the state statute, the police power was validly exercised. Upon this ground they insist that the bill should have been, and must be now, dismissed for want of jurisdiction and without any inquiry into the other issues of law and fact. The original bill set out two grounds of jurisdiction, first that of diverse citizenship, and, second, that the case arose under the Federal Constitution in that the order violated the contract clause of the Federal Constitution, and also the Fourteenth Amendment. The intervention of the Kansas Company, a citi-

zen of the same State as the Wichita Company, its opponent, did not take away the ground of diverse citizenship. That ground existed when the suit was begun and the plaintiff set it forth in the bill as a matter entitling it to go into the District Court. Jurisdiction once acquired on that ground is not divested by a subsequent change in the citizenship of the parties. *Mullen* v. *Torrance*, 9 Wheat. 537, 539; *Clarke* v. *Mathewson*, 12 Pet. 164, 171; *Koenigsberger* v. *Richmond Mining Co.*, 158 U. S. 41, 49; *Louisville, New Albany & Chicago Ry. Co.* v. *Louisville Trust Co.*, 174 U. S. 552, 566. Much less is such jurisdiction defeated by the intervention, by leave of the court, of a party whose presence is not essential to a decision of the controversy between the original parties. See Equity Rule 37. *Adler* v. *Seaman*, 266 Fed. 828, 841; *King* v. *Barr*, 262 Fed. 56, 59; *Jennings* v. *Smith*, 242 Fed. 561, 564. The Kansas Company, while it had an interest and was a proper party, was not an indispensable party. *In re Engelhard*, 231 U. S. 646.

The jurisdiction of the District Court was not limited to federal questions presented by the bill, but extended to the entire suit and every question, whether federal or state, involved in its determination.

The appellant assigns for error that the Circuit Court of Appeals, by directing a dismissal of the bill, refused it a hearing on the truth of the averments of the answer as to the validity of the order, and also on the issue made by the bill and answer as to whether the rates, as fixed by the Commission, deprived it of its property without due process of law and denied it the equal protection of the laws. In this ruling we think there was error.

The stress in the hearing on the motion was put on the two contentions, one, that the order of the Commission was void on its face for lack of a necessary finding that the existing contract rates were unreasonably low, and the other, that the facts averred in the petition of the

Kansas Company to the Public Utilities Commission were not sufficient to justify such a finding if it had been made. The District Court sustained the contention; the Court of Appeals denied it. The motion for judgment being overruled, the complainant should have been accorded an opportunity, the right to which it had carefully reserved, to traverse the allegations of fact by the Kansas Company as to the basis for the order of the Commission and also to maintain by evidence and argument the issue as to due process of law and the equal protection of the law. The charge that the order made a classification denying due process and the equal protection of the law was a mixed question of law and fact, upon which the complainant had a right to be heard. Neither court passed on it. For this reason, if there was nothing else, the decree of the Circuit Court of Appeals would have to be reversed. *Lane* v. *Pueblo of Santa Rosa*, 249 U. S. 110, 114.

There still remain for our consideration the questions upon which the courts below differed.

The Public Utility Law of Kansas, c. 238 of the Session Laws of 1911, creates a commission and makes full provision for its procedure and powers. Section 13 provides that:

"It shall be the duty of the commission, either upon complaint or upon its own initiative, to investigate all rates, . . . fares . . . and if after full hearing and investigation the commission shall find that such rates . . . are unjust, unreasonable, unjustly discriminatory or unduly preferential, the commission shall have power to fix and order substituted therefor such rate or rates . . . as shall be just and reasonable."

Section 14 and § 15 require the complaint against rates, etc., to be in writing, and a formal public hearing of which due notice is to be given to the parties interested.

Section 15 directs how the notice shall be given and how long before the hearing and its contents.

Section 16 provides that if upon such hearing the rates, etc., of any public utility are found to be unjust, unreasonable, unfair, unjustly discriminatory or unduly preferential, the Commission shall have power to fix and substitute therefor rates, etc., "as it shall find, determine or decree to be just, reasonable and necessary." It provides that all orders and decisions of the Commission whereby any rates, etc., are altered, changed, modified, fixed or established, shall be served on the public utility affected thereby and that such public utility, unless an action is commenced, in a court of proper jurisdiction, to set aside "the findings, orders and decisions" of the Commission or to review and correct the same, shall carry the provisions of the order into effect.

Section 20 provides that, whenever any public utility shall desire to make a change in any rate or rates, it shall file with the Commission a schedule showing the changes desired to be made and put in force by such public utility, but that no change shall be made in any rate without the consent of the Commission and within thirty days after such changes have been authorized by the Commission copies of such schedule shall be filed in every station, office or depot of such public utility for public inspection.

It is said that the order in this case was authorized by § 20 and therefore that all that was needed was the filing of a schedule of changed rates and the consent of the Commission, and that no finding was required as in § 13 and § 16. This construction of § 20 is doubtless correct, but it shows that the filing of a schedule of changed rates under that section cannot accomplish the result of abrogating contract rates. It could not do so any more than would the original filing of a schedule of rates under § 11 requiring every public utility to publish and file with the Commission all schedules of rates do this. The consent of the Commission in § 20 is made necessary only to prevent changing schedules without notice to the Commis-

sion and thus to secure a proper supervision of schedules. Such consent does not involve a hearing or a finding and a decision. The section does not, therefore, cover, or measure the essentials of, the proceeding in this case before the Commission which the order shows was upon pleadings and *inter partes*. We find nothing in *State ex rel. Caster* v. *Kansas Postal-Telegraph Cable Co.*, 96 Kans. 298, which gives a different construction to § 20.

The majority opinion in the Circuit Court of Appeals in maintaining the validity of the order in this case relies on § 18 of the act, which provides that all orders, rates, etc., fixed by the Commission shall be in force thirty days thereafter and shall be *prima facie* reasonable until changed by the Commission or by a court; and holds from this that it must presume that there was substantial evidence to warrant the findings. But as we have seen there is no finding of reasonableness or unreasonableness. Nor can we suppose that the presumption was to obtain until there was such a finding.

The Supreme Court of Kansas, in applying the statute, recognizes that a contract for rates with a public utility can not be abrogated except after a finding by the Commission that they are unreasonable. This is made clear by the decision in *Kaul* v. *American Independent Telephone Co.*, 95 Kans. 1. In that case, a number of customers sought to enjoin a telephone company from disconnecting their lines because they did not pay the schedule rates published and filed with the Commission under the law of 1911 we are considering. The complainants showed an agreement by the Telephone Company made before the Act of 1911, by which the Telephone Company had engaged to furnish them the service at lower than the published schedule rates on file with the Commission. The injunction was granted. The court said:

"While that commission is vested with broad regulatory powers it is not shown nor claimed that it has found

the contract rates to be unreasonable. Granting, without deciding, that the commission has the power under the law to determine whether or not the rates prescribed by the contract are reasonable and valid, and to revise them if found to be unreasonable, it does not appear that it has exercised the power, nor that they have been presented to it for its consideration. The passage of the act did not automatically overthrow contracts, nor set aside schedules of rates which had been agreed upon. Neither did the fact that the defendant published and filed a schedule of rates with the public utilities commission abrogate the contract. In any event, rates previously agreed upon between utilities and patrons will continue in force until the commission has found them to be unreasonable, and has prescribed other rates."

The proceeding we are considering is governed by § 13. That is the general section of the act comprehensively describing the duty of the Commission, vesting it with power to fix and order substituted new rates for existing rates. The power is expressly made to depend on the condition that after full hearing and investigation the Commission shall find existing rates to be unjust, unreasonable, unjustly discriminatory or unduly preferential. We conclude that a valid order of the Commission under the act must contain a finding of fact after hearing and investigation, upon which the order is founded, and that for lack of such a finding, the order in this case was void.

This conclusion accords with the construction put upon similar statutes in other States. *Public Utilities Commission* v. *Springfield Gas & Electric Co.*, 291 Ill. 209; *Public Utilities Commission* v. *Baltimore & Ohio Southwestern R. R. Co.*, 281 Ill. 405. Moreover, it accords with general principles of constitutional government. The maxim that a legislature may not delegate legislative power has some qualifications, as in the creation of municipalities, and also in the creation of administrative

boards to apply to the myriad details of rate schedules the regulatory police power of the State. The latter qualification is made necessary in order that the legislative power may be effectively exercised. In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action. When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective.

It is pressed on us that the lack of an express finding may be supplied by implication and by reference to the averments of the petition invoking the action of the Commission. We can not agree to this. It is doubtful whether the facts averred in the petition were sufficient to justify a finding that the contract rates were unreasonably low; but we do not find it necessary to answer this question. We rest our decision on the principle that an express finding of unreasonableness by the Commission was indispensable under the statutes of the State.

We think the motion for judgment on the pleadings should have been granted.

The decree of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.